109-446

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 80.

GEORGE A. CUNNINGHAM,

Appellant,

vs.

THE MACON AND BRUNSWICK RAILROAD COMPANY AND OTHERS,

Appellees.

BRIEF FOR APPELLEES.

JOSEPH H. CHOATE,
Of Counsel.

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Appeal from the Circuit Court of the United States for the Southern District of Georgia.

BRIEF FOR APPELLEES.

Statement of Facts.

The various questions presented by the bill for adjudication must determine the question of jurisdiction.

The first question, which underlies the plaintiff's whole case, is, whether the State ever did guarantee the payment of the $600,000 series of bonds of which he holds nineteen. The allegation is, of such a guarantee, and of an act passed

October 27, 1870, authorizing the Governor to endorse them.

But it is alleged that the State claims that that act was unauthorized, and unconstitutional, by reason of a failure to comply with the provision of the Constitution of 1868, set forth in the bill.

This question of constitutionality, and of the very existence of the plaintiff's rights, as holder of any guarantee or endorsement of the State, cannot, of course, be determined or considered by this court on this appeal, but its existence as an issue to be finally adjudicated upon in the case, if it proceeds, is manifest at the threshold, and it is equally clear that the only parties to it are the plaintiff and other holders of the bonds with the alleged guarantee, upon the one side, and the State upon the other. The Governor, the treasurer and the directors are not, and cannot be parties to that issue, nor can they in any sense represent the State upon it.

The next question, equally vital, is as to the existence of the first issue of $1,950,000 of bonds, and the right of the State to hold the railroad for its indemnity against the same, which it has paid by the issue of new bonds.

The plaintiff claims that the bonds have been extinguished by the new issue, and that thereby, or by reason of alleged irregularities in the sale and purchase by the State, the State has lost all right to hold the property, at all, for its indemnification against the original issue of bonds.

This question, it is also clear, is an issue to be finally adjudicated in the case, if it proceeds, between the plaintiff and the State in its sovereign capacity, and upon which the officers made defendants are not alleged to have any capacity to represent it.

The next question presented by the bill is, assuming the right of the State to hold the property for its indemnification against the $1,950,000 series of bonds, whether the holders of the $600,000 series, if the guarantee thereon is valid, have a direct lien on the property and the right to be let in *pro rata* with the first series, or at all as a necessary construction of the Act of 1870, under which they were issued.

The State, having acquired the whole of the first series, is

the sole party to this issue upon the one side, and the plaintiff is the other party. On this issue there is no representative capacity alleged or pretended, in the defendants, for the State.

The next issue raised, is, as to the right of the plaintiff to foreclose his alleged mortgage or lien; that is to say, to take the property out of the possession of the State and have it sold and applied by the court to the payment of his series of bonds. And then he asks that if this cannot be done, that then, on his *pro rata* theory, the State may be compelled by the court, whenever it appropriates moneys for the payment of the principal of the new State bonds exchanged for the $1,950,000 issue, to divide the sum so paid *pro rata* among the holders of both series of endorsed bonds and that the State bonds so exchanged shall be treated as the proceeds of the sale of the railroad and divided *pro rata* among all the holders of both series of State endorsed bonds. And finally, that the State Treasurer be enjoined from paying any further coupons on the bonds of the State exchanged for the $1,950,000 series of endorsed bonds.

There is also a demand, on the part of the plaintiff, that a certain small amount of the property, alleged by him not to have been covered by the lien of the first series of bonds, but seized by the Governor thereunder and sold and purchased and now held by the State, may be taken from the possession of the State by the court and applied upon his bonds.

Upon each and all of these questions it is entirely manifest that the issue is one between the plaintiff and the State in its sovereign capacity, and that no officer of the State can represent it thereon.

Although the bill does not allege that the defendants Flewellen, Lofton and Jones, who are sued as "styling themselves Directors of the Macon and Brunswick Railroad," are in possession of the road as agents of the State, yet the actual possession and title of the State are plainly alleged and conceded, and the Act of Georgia, of March 5th, 1875 (Georgia Laws, 1875, Part I, Tit. III, No. VII), passed three months prior to the sale, and evidently in contemplation thereof, shows that the said defendants are only

holding as officers of the State, and that their possession can be no other than that of the State.

The second section of that act provides as follows: "Be "it further enacted, that if any one or more of the railroads, "so having the State's endorsement upon its bonds, shall "be purchased by the State under the foregoing section, "then it shall be the duty of the Governor to appoint for "each of said railroads three discreet and responsible per- "sons, who shall take charge thereof as a Board of Directors, "with full and ample power to manage the same."

Again, it is alleged that the Governor was not authorized to bid on the property for the State, and that the State had no constitutional power to make the purchase. But the first section of the Act of March 5th, 1875, above quoted, seems to cover the case: "An Act to provide for the further protec- "tion of the State where its endorsement has been obtained "upon railroad bonds, and enable the Governor to appoint "commissioners to manage or otherwise dispose of the "same under his authority.

"Whereas, it is provided, in the acts authorizing the "State to endorse the bonds of certain railroads, and, upon "the happening of certain contingencies therein specified, "to seize and sell the same.

"And whereas, there is no authority given by law to "protect the State in case any of the said roads were "likely to be sacrificed under said sales.

"For a remedy whereof,

"Section 1, be it enacted by the General Assembly of "the State of Georgia, that whenever any railroad having "the State's endorsement upon its bonds shall be brought "to sale under the laws of force touching the same, the "Governor shall be, and he is, hereby authorized and em "powered, in the name of the State, to bid for and to buy "the same, if at such sale the said railroad is likely to be "sacrificed, or sold for an amount less than its intrinsic "value, and of which he shall be the judge, provided the "Governor shall in no case bid a larger amount for said "road than the State's legal liability."

There is no allegation or pretense in the bill, that the property was worth more, or could have been sold for

more, than the amount due for principal and interest upon the first and undisputed issue of nineteen hundred and fifty thousand dollars of bonds; nor is there any attempt, or offer, to redeem the property from the lien of the State for that series of bonds.

The whole theory of the bill is, that by reason of the State's having, after coming into possession of the road under its lien and the sale, taken up the whole series of $1,950,000 of bonds, that thereby all right, lien and interest of the State in the railroad had ceased, and that the holders of the second series of six hundred thousand dollars of bonds can have the property taken by the court from the State and applied for their benefit. But the Act of Georgia of February 19, 1877 (Georgia Laws, 1877. Part I, Tit. II, No. IV), which provided for the issue of the new bonds of the State, by which the first series of $1,950,000 of bonds was taken up, contains nothing whereby the lien of the State for its indemnity could be in the least impaired. It simply authorizes the issue of the new bonds for the purpose of selling at par, and with the proceeds of such sale, at par, taking up the old bonds.

POINTS.

I.

The State is the real party, and is an indispensable party to the action for the determination of each and all of the questions presented by the bill.

The officers who are made defendants, not individually, but purely in their official capacity, cannot represent it, and jurisdiction cannot be taken against the State by the indirect device of making its officers parties. Though nominally brought against the Governor and other officers, it is, in substance, a suit against the State, and cannot be maintained in a court of the United States, or in a court of the State. The State in its sovereign capacity cannot be

thus arraigned and brought to trial in its own courts, or in the courts of the Union.

Troy & Greenfield R. R. vs. *C'wealth*, 127 Mass., 43,
H. Briggs vs. *Light Boats*, 11 Allen, 157.
Branch vs. *M. & B. R. R. Co.*, 2 Woods, 385.
Chamberlain vs. *St. Paul R. R. Co.*, 92 U. S., 299.

(*a.*) All the questions of right and liability, all the questions of title and possession, presented by the bill, are strictly and exclusively questions between the plaintiff and the State, which no court can undertake to pass upon without the presence of the State as a party; and that being impossible, the bill must necessarily be dismissed.

Whether the State is liable on the plaintiff's bonds at all; whether, as against the State, the holders of the second series of bonds can altogether displace the first series and the lien of the State to cover the same; whether the property can be taken out of the hands of the State and applied by the court to the payment of the plaintiff's bonds, and, if so, to what extent, can only be determined by direct adjudication against the State. The Circuit Court, of course, has only co-ordinate jurisdiction with the State Courts in the matter, and can only do what the State Courts themselves could do in the exercise of general equity jurisdiction. The suit instituted by the bill, carried through to judgment and execution, necessarily involves a direct adjudication upon the rights contested by the State, and the forcible taking of property from its hands by the court, and applying it to the discharge of claims which it disputes. There is no precedent, authority or principle upon which jurisdiction in such a case, to such an extent, and for such purposes, can be asserted.

Branch vs. *M. & B. R. R. Co.*, 2 Woods, 385.

(*b.*) None of the cases relied upon by the brief of the appellants sustain the suit.

In *Osborn* vs. *U. S. Bank*, 9 Wheaton, 846, no such claim was made. There, under a law of the State, void, because repugnant to the Constitution of the United States, the defendant had, without any right, taken and received from the plaintiff the specie and bank notes of the bank, and held the same in his individual capacity, and the defendants were ordered to return the property wrongfully taken; and it was also held that a Court of Equity may restrain, by injunction, a public officer of the State from acting under a void law of the State to destroy a franchise. There, the courts of the United States interfered to protect those who were employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws. It was held that the law of the State of Ohio directing the collection of a tax, being repugnant to the Constitution of the United States, furnished no authority to those who took or to those who received the money for which the suit was instituted. The decree of the Circuit Court was affirmed, so far as it directed restitution of the specific sum of $98,000, which was taken out of the bank unlawfully, and was in the possession of the defendant Sullivan when the injunction was awarded in September, 1820, to restrain him from paying it away or from in any manner using it.

We cannot see how this decision or any of the principles laid down by the court therein justifies the jurisdiction attempted to be asserted in the present case.

In the case of *Swasey* vs. the *N. C. R. R. Co.*, decided by the learned Chief Justice in 1 Hughes, 17, jurisdiction was maintained against the railroad company upon the ground that the State was not a necessary party, because there was a direct and express lien created for the benefit of the bondholders, to be enforced, not through the State, but by direct proceedings on the part of the bondholders, and so intended to be by the parties at the time of its creation. The Chief Justice says expressly, p. 21: "It was clearly the un-

" derstanding of the parties that the State not only " should, but that it in fact did, grant to the bondhold- " ers the power to use the machinery of the courts to " subject this portion of their security if default should " be made in the payment of the debt." This is based upon the special language of the act. The property sought to be affected by the suit was stock in the company for which no certificate had ever been issued, and which the act was held to pledge directly to the bondholders.

In *Davis* vs. *Gray*, 16 Wallace, 203, the court sustained jurisdiction in a suit brought by the Receiver of a railroad company to restrain the Governor and Commissioner of the Land Office of the State of Texas from issuing patents without authority of law which should constitute a cloud upon the title of the Receiver *to the property of the company which was in his possession.* It bears, we think, no real resemblance to the case at bar.

But in that case, also, jurisdiction for the purposes there invoked seems to have been settled by the adjudications of the State itself. The court says: " According to the jurisprudence of Texas, suits " like this can be maintained against the public of- " ficers who appropriately represent her touching the " interest involved in the controversy. In the applica- " tion of this principle there is no difference between " the Governor of a State and officers of a State of " lower grades. In this respect they are upon a footing " of equality."

There was no attempt to take property from the possession of the State, and there was no concession there, as here, of title in the State. The title of the railroad company was fully established. The law, under which the defendants were seeking to issue the patents, was held to be wholly null and void.

A brief citation from the opinion of the court in *U. S.* vs. *Peters*, 5 Cranch, 115, will show how utterly inapplicable that case is to the present: " These

"circumstances demonstrate, beyond a possibility of "doubt, that the property which represented the "*Active* and her cargo, was in the possession not of "the State of Pennsylvania, but of David Rittenhouse, as "an individual, after whose death it passed, like other "property, to his representative. Since, then, the State "of Pennsylvania had neither possession of, nor right to, "the property on which the sentence of the District "Court was pronounced, and since the suit was neither "commenced nor prosecuted against that State, there "remains no pretext for the allegation that the case is "within that amendment of the Constitution which has "been cited."

In the case of *The Siren*, 7 Wallace, 157, all that was held was, that although for reasons of public policy a lien for damages against a vessel of the Government cannot be enforced by direct proceedings against the vessel, yet it will be enforced by the courts whenever the property itself upon which the lien exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control; that the Government in such a case stands, with reference to the rights of the defendants or claimants, as private suitors do, except that it is exempt from costs and from affirmative relief against it beyond the demand or property in controversy.

The case of *Carr* vs. *The United States*, 98 U. S. 433, is conclusive against the jurisdiction.

(*c.*) The plaintiff claims no title in himself. The full extent of his claim as made, in any aspect, is of an equitable interest as alleged beneficiary of a trust of which the State is alleged to be trustee, and of a right to enforce it against the State by taking the property out of its possession. He necessarily concedes the title of the State. There is no pretense of its being in anybody else. To be sure he claims, in one aspect of his presentation of the matter, that the State was the trustee and could not buy at her own sale, and claims the right of a beneficiary to repudiate the purchase. But that is no assertion of title in the plaintiff.

If the sale disappears, then the property remains in the possession of the State, seized under claim of title according to the provisions of the act creating the lien of the State, and in that aspect the plaintiff's claim merely is first to avoid the sale as against the State, by the interposition of the equitable power of the court, and then to sequestrate the property by taking it away from the State and devoting it to the satisfaction of his debt.

In a case presenting these as its cardinal features it is respectfully submitted, that no court has ever presumed to assume jurisdiction against the sovereign without its express consent. The policy on which the rule is founded, that the sovereign cannot be sued in its own courts, except by express permission, could have no more appropriate illustration than the facts of this case as conceded by the bill.

(*d.*) Upon this question of jurisdiction it really is impossible to suggest any difference of principle, whether the statutory mortgage is deemed to be merely an indemnity to the State for its reimbursement, or to constitute it a trustee for the bondholders; whichever be the legal status, the facts as to title and possession remain the same. It is the State that holds the property; it is not even in the possession, physically, of the defendants who are named directors; they are merely constituted commissioners to manage it.

Whether the State be trustee or hold absolutely in its own right, still, in order to give the plaintiff any relief whatever, it is necessary first to determine adversely against the State the substantial questions of right, and then, in order to afford a remedy, to wrest the property from its possession by the process of the court and apply it to the relief of the plaintiff. As was well said by the learned judge below: "To say that the "State, under the facts, is a trustee for the bondholders, "does not change the case; because every surety who "holds property for his own indemnity may be called "upon by the creditor to apply the property to the "payment of his debt. The surety, however, is still a

" surety and holds the property, primarily, for his own " protection.

" The main purpose of the bill is to dispute the title " of the State to the property possessed and claimed by " her, and by the decree of this court to transfer the " property to the holders of a series of bonds with whom " the State claims she never entered into any valid obli- " gation whatever. That is the case made by the bill, " when stripped of the plausible theories with which the " genius of counsel had clothed it.

" It is the title of the State that is assailed. The attack " is not made against the State directly, but through her " officers. This indirect way of making the State a party " is just as open to objection as if the State had been " named as a defendant."

The theory of a trust in the State for the benefit of the bondholders involves the arraignment of the sovereign in its own court, to subject it to the equitable power of its own court in order to compel it to perform its duties as trustee.

(*e.*) As to the three bonds for $1,000 each of the $1,950,000 series, in respect to which jurisdiction is sought to be maintained, if not as to the rest of the property, it is conceived that the situation of the plaintiff as to jurisdiction stands no better. They appear to have been included in the trust deed to Whittle, and the allegation is that the Governor, under power vested in him by the act, seized the property mentioned in the deed to Whittle and included it in the sale to the State, and they were by Whittle transferred to Renfroe as Treasurer of the State. In respect to these the plaintiff asserts not title, but the right to have the title of the State declared to be held in trust for his benefit, and in respect to these also to compel the State to discharge its proper duties as trustee.

In respect to the 440 shares of the Telegraph stock, included in the Whittle trust, it is expressly alleged in the bill that Whittle has transferred the same on the books of the company, to Renfroe, and they are in-

cluded in the sale and in the Governor's deed to the State (Record, page 23), the certificate going with the deed. So that as to this item also, it would seem impossible to draw any real distinction of principle between it and the rest.

Chamberlain vs. *The St. Paul, &c., R. R. Co.*, 92 U. S., 306, contains a distinct statement of the doctrine for which we contend.

"Whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one resting in equity only. * * It was a right to be enforced, if at all, only by a Court of Chancery against the surety. *But the State being the surety here, it could not be enforced at all.*" * * * * * *

(*f.*) Assuming, for the sake of argument, that the State holds the property as trustee, as claimed by the plaintiff, and that the plaintiff and other bond-holders are the beneficiaries of that trust, the State of Georgia is not only a *proper*, but an *indispensable*, party to the suit, without whose presence before the court in the suit as a party no decree in favor of the complainant can be made without the violation of well settled and inflexible principles.

And, as a rule of procedure in equity, it is settled beyond question, that where an *indispensable* party is not before the court, and it is *impossible*, for any, reason to bring in such party (as in the case of the sovereign or a sovereign State), the necessary consequence is not that the suit shall proceed to decree without the presence of the indispensable party, but that it shall be dismissed because of the inability to carry it on in any way consistent with the administration of equity.

Shields vs. *Barron*, 17 How., 130.
Barney vs. *Baltimore*, 6 Wall., 280.
Kendix vs. *Dean*, 97 U. S., 425.

It would be a mere farce to carry on this suit to a decree without the presence of the State as a party, as

there are no rights to be concluded but hers, and nothing to be gained by the plaintiff by any possible decree in his favor, except at her expense. It can only operate, if at all, upon her title and her possession, the defendants individually having none.

The bill (p. 10) asks that the State of Georgia may come in and make herself a party if she should wish to do so. But the XIth amendment of the Constitution expressly forbids the court to entertain jurisdiction of her, if she should so desire.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizeds of another State." * * *

II.

We assume that the question of jurisdiction, which was all that was considered and determined by the court below, is the only one that can be considered and determined here.

If the judgment of the court below is sustained upon that point, it necessarily ends the case by an affirmance of the judgment dismissing the bill. If the jurisdiction is upheld, the case must go back to the Circuit Court for answer and trial. But it would in that case, of course, be unnecessary and premature for the court to pass upon any other questions involved, upon all of which the subsequent pleadings and proofs in the cause must necessarily have a vital bearing. Anything emanating from this court on this appeal upon these questions would necessarily be *obiter* only. It is, therefore, with surprise that we find every possible question that may hereafter arise upon the trial of issues to be raised by bill and answer discussed in the appellant's brief.

It is only for this reason that we proceed to discuss them briefly.

III.

If, notwithstanding its immateriality on the question of jurisdiction, the court should proceed to consider the first question raised by the appellants, we submit that :

The statutory mortgage is not a lien in favor of the holders of the $600,000 *endorsed bonds, of which plaintiff is a holder, but is only an indemnity to the State.*

(*a*.) It is asserted, but no reason whatever is given for the assertion, (Appellant's Brief, p. 8), that the Act itself creates a direct lien in favor of the bondholders.

On the contrary, we submit that the language of the act, and its manifest intent and purpose, and the method provided in it for carrying the lien into effect, contemplated only indemnity to the State.

Its Language.—By the preamble it recites that the projected completion of the road to Brunswick would greatly enure *to the benefit of the State*, in developing its various interests.

By section 1, that before endorsing, the Governor shall be satisfied that the road is free from all liens or mortgages, or other incumbrances which may in any manner *endanger the security of the State*, and the endorsement is given upon the further condition and express understanding that any endorsement of the bonds when thus made shall not only vest the title to all property of every kind which may be purchased with said bonds *in the State*, until all the bonds so endorsed shall be paid, but the said endorsement shall be and is hereby understood to operate as a prior lien or mortgage on all the property of the company as hereinafter provided for, and

Section 2 provides that in case of default by the company upon principal or interest on the bonds, it shall be the duty of the Governor to seize and take

possession of all of the property of said railroad company, and apply the earnings of said road to the extinguishment of said bonds, and he shall sell the said road and its equipments and other property belonging to said company, in such manner and at such time as in his judgment may best subserve the interest of all concerned.

The bondholders are not mentioned. Nothing indicates any right on their part to enforce or put in execution the lien.

The provision for the application of the earnings to the extinguishment of the bonds is simply in the interest and for the benefit of the State. It was necessary in that connection to mention the bonds, which were the foundation of the right of the State. A more careful avoidance of all mention of the bondholders could not have been devised.

The phrase, "for the benefit of all concerned," includes not only the State but the company, and all lienors subsequent to the State.

Remotely and indirectly it may embrace the bondholders, but such a reference to them, if intended, could not operate to give them a direct and specific lien on the property, to be enforced by proceedings in their own name and on their own behalf.

The State alone is named as mortgagee; the sole condition is in its favor; the only remedy is secured to it alone.

But further, the State was, at the time of the passage of the act, in good credit, and has been ever since. The theory of the act contemplates the payment of the principal and interest of the bonds by the State at maturity, and they appear to have been so paid. The obligation of the State and of all its resources to the payment of its own guarantee on the bonds, was an ample security to the bondholder, far greater than the alleged liability in equity to account for the property of the road now claimed by the plaintiff.

The manifest intent and purpose of the lien created

by the act was to give to the State the direct and exclusive hypothecation of the property, assuming the recognition and payment by it under its guaranty of all bonds lawfully issued.

Chamberlain vs. *St. Paul, &c., R. R. Co.*, 92 U. S., 299, seems perfectly conclusive upon this point of our case. It establishes beyond question that these bondholders have no lien, and that any possible right in equity they may have against the State does not attach to and follow the property; that while it remains in the hands of the State they cannot touch it, because the State is nonsuable, and that in case of a transfer by the State, the property having passed into its hands unaffected by any lien, will pass out of them equally unincumbered. For if the Acts, under which the rights of the bondholders were asserted in that case, did not create a direct lien to the bondholders, it is absolutely certain that the language used in the Act of 1866, in this case could not do so.

An examination of the record in that case will show, that in the first place there was an express constitutional provision requiring the borrowing company in every case to provide for the punctual payment and *redemption* of all State bonds issued and delivered to the company, and for the punctual payment of the interest *in such manner as to exonerate the treasury of the State;* and second, that the mortgage deed to the State, which recited this constitutional provision, conveyed the property upon the express trust *to apply the proceeds of sale to the payment* of the bonds, and with a defeasance conditioned upon the prompt payment by the company of the bonds, and "so soon as the same shall be fully paid and cancelled."

Compare this with the terms of the Georgia Act of 1866, and it is at once apparent that if there was no direct mortgage to the bondholders there, there cannot possibly be here.

The decision of this court was emphatic that no lien or trust in favor of the bondholders existed or was in-

tended. Its language is unmistakable. It will be remembered that there the State had sold the property to a new company, against which the bondholders filed the bill to enforce their supposed rights.

"In this case the deed and mortgage to the State "were not intended to create a trust in favor of the "holders of her own bonds. * * Whatever "right the plaintiff had to compel the application of "the lands received by the State to the payment of the "bonds held by him, it was one resting in equity only. "It was not a legal right arising out of any positive "law or any agreement of the parties. It did not "create any lien which attached to and followed the "property. It was a right to be enforced, if at all, "only by a Court of Chancery against the surety. "But the State being the surety here, it could not be "enforced at all, and not being a specific lien upon the "property, cannot be enforced against the State's "grantees.

"Where property passes to the State subject to a "specific lien or trust created by law or contract, such "lien or trust may be enforced by the courts, when-"ever the property comes under their jurisdiction and "control. Thus, if property held by the Government, "covered by a mortgage of the original owner, should "be transferred to an individual, the jurisdiction of the "court to enforce the mortgage would attach, as it "existed previous to the acquisition of the Government "(*The Siren*, 7 Wall., 158). But where the property is "not affected by any specific lien or trust in the hands "of the State, her transfer will pass an unencumbered "estate."

That decision rests upon the broad principle, irrespective of any refined distinctions as to the form or manner of the security, that wherever security is taken in such manner that the State practically holds it, and that whatever rights to its application the creditor might otherwise have, can only be made practically available by means of suits in equity against the surety, and that surety being, as a State, non-suable, such rights,

whatever they are, do not, upon the State's transferring the property, spring up into existence against it, but that the State's transferee takes an unencumbered title.

In the present case clearly any possible equity of the bondholders, if any exists, must be enforced only through the State, and, therefore, it cannot be enforced at all.

No legal title, no right of seizure, is by the statute given to these bondholders. All that is given to the State and to the State only. It would, we submit, be absurd to claim a right of entry to the bondholders on default in the payment of interest, or that any remedy whatever was intended to them independent of the State and its action in the premises.

(*b.*) But apparently the plaintiff's main reliance is upon the mortgage subsequently executed by the company to the State, as evidencing the intent of the parties, and so putting a construction upon the lien created by the act.

And this is based upon the use of the words in the recital of the mortgage, "the lien created by the aforesaid act, in favor of holders of said bonds so indorsed," and "for the purpose of confirming the aforesaid lien, and for the better securing the payment of the moneys mentioned in the condition of the bonds," &c.

This mortgage was executed by the company some three and a half years after the statutory lien was created. It is alleged in the bill to have been given for *some unknown reason*, and all the bonds provided for by the act had then already been issued.

It certainly could have no legal effect to alter the nature of the lien created by the previous act. That had fixed the nature of the lien. That had carried to the State for the purpose of that lien all the property of the company, present and prospective.

Again, it was not in the power of the Governor and the company, by delivering and receiving this mortgage, to change the status and rights of the State in relation to the lien and the property, which had been fixed by statute.

It had no relation to any bonds but the first series of $1,950,000. The second series of $600,000, had not then been issued or thought of. The act authorizing them had not even been passed. The mortgage is expressly limited to the $1,950,000 then already issued under the Act of 1866. Its sole legitimate effect, if any, was to strengthen and confirm the security already existing for those bonds. The amendment of the Act of 1866 by the Act of October, 1870, which purported to authorize the issue of the $600,000, could by no possibility operate to give to the latter any benefit of this mortgage. Whatever the *statutory* mortgage was, the new bonds created by the amendment, if valid, might stand in the same relation to it as the first series had done, after the actual satisfaction by the company of the first series, but they could not be tacked on to this *voluntary* mortgage.

This voluntary mortgage cannot be claimed to be an act of the parties construing the statutory lien, for the State was no party to it. Moreover, it was not a contemporaneous act, not a part of the *res gestæ*. It was an isolated, long subsequent act, and so far as its receipt by the Governor is indicative of anything, it only indicates the individual opinion of the then Governor, who was a different person from the Governor in office when the original act was passed and the bonds thereunder issued.

Besides, the whole argument sought to be deduced from the execution of this mortgage is unfounded. It does not create or imply the existence of a direct lien to the bondholders as distinguished from a right in equity to be enforced only through the State.

(*c.*) So, in regard to the construction sought to be imputed to the original act by the form of the bonds issued under it and endorsed by the Governor, the same observations apply.

At any rate, the bonds of the second series are wholly different. They are entirely destitute of all the features of the bonds of the first issue indicative of any mortgage security whatever. They are not, like the former, described upon their face as mortgage bonds. They make no reference, as the former did, to the right of the Governor to seize the property of the company and sell the same for the payment of the bonds. They make no reference to the act itself. They are a simple, naked bond for the payment of the money. So that whatever argument can be drawn from the expressions used in the former bonds cannot enure to the benefit of the latter.

So, the release executed to the Governor by the Trustees of the intermediate mortgage, could have no legal effect to modify the nature and character of the statutory lien, and as an act of the Governor still later in date, it cannot bear upon its construction.

Again, the Legislative resolution of 1872, affirming generally that the State's guaranty on the bonds of the company was binding on the State, does not better the plaintiff's case.

If the original Act of 1870, authorizing the guaranty was void, because prohibited by the constitution, the Legislature of 1872, upon the same existing facts was equally powerless to make it good. The constitutional provision tied the hands of both Legislatures alike.

The validity of the guarantee does not depend either upon the Resolution of 1872, declaring it valid, or upon the Resolution of 1875, declaring it void, but upon the validity of the original act. So that the suggestion that the claim of the State rests upon a law impairing the obligation of a contract has no foundation.

(*d.*) The extraordinary device of the appellant in his brief (pages 8 and 9), by which he seeks to make out that,

although the statutory lien created by the original act was not a direct lien to the bondholders, and so that the holders of the $1,950,000 series could not avail of it, and yet, that by the misrepresentations of the governor and president of the company, the State is estopped, as to the holders of the $600,000 series, to deny that the statutory lien inures to their benefit, by which he claims to brush aside the first series altogether, and to come upon the property with his $600,000 series as a first lien, can hardly commend itself to a court of justice. In the first place, there is no ground for the estoppel, as we know of no authority for the suggestion that a sovereign State can be estopped by the unauthorized representations of any one of its officers. Official authority is limited by law, and acts done beyond the scope of it, however intended, cannot preclude the sovereign from asserting the truth.

Story on Agency, § 307*a*.
Pierce vs. *The United States*, 1 *Nott & Hun* (*Ct. of Claims*), 270.
The Floyd Acceptances, 7 *Wall.*, 66.
Johnson vs. *The United States*, 5 *Mason*, 441.
The People of the State of Illinois vs. *Brown et als.*, 67 *Ill.*, 435.
The State ex rel. Lott vs. *Brewer*, 64 *Ala.*, 287.

The real question in regard to the $600,000 series as distinguished from the first series is, whether its original issue was invalidated by the Constitution, and if not, whether it is not necessarily postponed to the lien of the State for the repayment of the first issue.

If, as the plaintiff claims, and we deny, the original act under which the bonds were created operated at all to create a lien in favor of bondholders, and if the same effect is to be attributed to the Act of 1870, if valid, in respect to the further issue of bonds thereby authorized, certainly it enured first to the benefit of the holders of the $1,950,000 series of bonds, and the State and the company both acting together could not, without the assent of those bondholders, open the lien and extend it so as

to embrace $2,550,000 of bonds instead of bonds for $1,950,000.

If there ever was a lien for $1,950,000 it was a first lien when it was created, and could not thereafter be impaired by increasing the debt to $2,550,000, without the consent of the holders of the bonds of the first series, which was never given.

When the State seized the road, as it did, for default on the first series of bonds, it cannot be seriously questioned that the State had a right to hold the property until indemnified for the debt represented by that series of bonds which it had guaranteed.

Even if the sale were void, as pretended, or could be avoided, that would only remit the State to its original possession under its lien; and until it shall appear that the fair value of the property is more than sufficient for that indemnity, which is nowhere alleged in the bill, the claim of the plaintiff for a redemption or resale, in the most favorable aspect in which it can be alleged, can be entitled to no consideration.

The legal status of a pledgee who, without legal warrant, buys in the property pledged, is well settled. He still holds as creditor for his debt. He does not thereby, forfeit the pledge.

The State has passed no law impairing the obligation of any contract, as the plaintiff intimates, it simply defends against the claim upon the $600,000 series of bonds and the guarantee thereon, upon the ground that under the Constitution they never had any legal existence,

We deny utterly the proposition that there was anything in the State's relation to the bondholders which could prevent her buying at her own sale, or could give any of them an election to repudiate the purchase. We are not aware that any such rule of law has ever been applied to a sovereign State. The law prescribes that a private individual shall not buy at a sale at which he is the selling trustee, on account of the presumption that he will commit a fraud upon his beneficiaries. But how can any such presumption be imputed to the

case of a sale by a sovereign State? Can it be alleged that the State has committed, or will commit, a fraud? And can any presumption to that effect be made the basis of judicial action? At any rate, if there were such a right in one claiming to be a beneficiary or *cestui que trust*, he must at least show some justification for invoking the action of a Court of Equity, by alleging that the property was worth more than enough to cover the prior lien.

We submit, therefore, with all confidence, that, in any aspect of the case, upon the facts alleged in the bill no possible ground appears to justify the claim of the plaintiff representing the holders of the $600,000 series of bonds, to take the property out of the hands of the State upon the ground of a statutory, direct and specific lien created in their favor. If the claim is of anything less than a direct and specific lien to the bondholders, it is a right to be enforced, if at all, only by a court of equity against the State as a surety, and the case of *Chamberlain* vs. *The St. Paul R. R. Co.* holds conclusively that that doctrine of equity is utterly inapplicable to a sovereign State. If it did not take the property subject to a specific lien or trust created by law in favor of the bondholders, she might even transfer the property to a purchaser by a title wholly unencumbered by the supposed equity, as was held in that case.

The further claim of the plaintiff to be let in with the $600,000 series of bonds against the State *pro rata* with the $1,950,000 series, as the basis of his demand to restrain the State through its treasurer from paying the principal or interest of the new bonds issued to take up the latter series, raises so direct a conflict between the plaintiff and the State, that no court of the State or of the nation can think of passing upon it until jurisdiction for that purpose shall be allowed by the State itself.

(*e.*) It being beyond controversy, and indeed admitted, that the original seizure which was made by the State

under the Act of 1866 was legal, there is nothing suggested, by way of irregularity in the subsequent proceedings, to forfeit its right of possession for the purposes of that seizure.

It is claimed that the sale was not made in compliance with law, because the Act of 1866 authorized the Governor to sell only in such manner and at such time as in his judgment may best subserve in the interest of all concerned, whereas his letter (Exhibit F) shows that on the 24th of March, some three months previous to the sale, he expressed fears lest the time fixed for the sale should not be as favorable as a later day would be. But that cannot be taken as proof tending to show that when the day of sale came (the first Tuesday of June) his judgment did not approve it. On the contrary, the presumption is entirely in favor of the regularity of his acts, and that in making the sale he acted upon his then best judgment.

So as to the alleged change in the manner of sale, the allegation that the Governor in his order directing the sale, made April 5th, stated that it would be offered for cash for the bonds of the State, or the first mortgage bonds of the company endorsed by the State, and afterwards at the sale announced that the first mortgage bonds would only be received at their then market value, which was below par. This change was no departure from the terms of the Act of 1866, nor was there, in fact, any alteration of terms. It was entirely competent for him, having advertised that bonds of the company endorsed by the State would be received in payment, to receive them only at their actual value. In truth, that was the only just method of arriving at a fair price, and the deduction sought to be drawn from it in the bill, as causing the road to sell below its true value and deterring the holders of said bonds from bidding on the railroad, is not tenable.

There is nothing in law or equity which can make these modifications of opinion on the part of the Governor, between the 5th of April and the day of sale, a ground for vacating the sale. But if there were, if

these circumstances operated to invalidate the sale altogether, or made it subject to be avoided in equity, this, if accomplished, would leave the property, the possession of which continued in the State all the time, still in its hands as indemnity to the State for its guarantee upon the bonds.

The suggestion that the seizure by the State, though originally legal, became tortious by reason of the alleged irregularities in the sale, and so that the State has forfeited its right of possession, is a novel one, and certainly finds no support in the case cited.

Gregg vs. *Van Phul*, 1 Wallace, 274.

That was the case of a vendee under an executory contract of purchase of land entering into possession and then failing to comply with the terms of sale.

(*f.*) The provisions of the Code of Georgia regulating the proceedings for the foreclosure of mortgage on realty, set forth in appellant's brief, pages 10 and 11, can have no application as against the State itself in possession under a statutory lien which was created in its behalf by the Act of 1866. In no sense are the defendant Flewellen and his associate directors tenants in possession. The State alone is in possession, and they, under the act, are only her commissioners managing it on her behalf.

See Code of March 5, 1875.

IV.

In respect to the extraordinary claim of the plaintiff, to interfere by injunction against the Treasurer of the State with the payment of the coupons on the new series of bonds

issued to take up the $1,950,000 series, although there is an allegation in the bill (page 5) that these bonds have been substituted for the original series, the act under which the issue was made, Act of February 19, 1877, provides that they should be issued to be sold at par, and with the proceeds of such sale at par taking up the old bonds, or exchanging said bonds at par for the old bonds, *and in the absence of any allegation that the bonds are held by the same parties who held the old bonds*, we submit that the bill is simply an attempt, to that extent, to interfere with the relations of the State to its creditors, bondholders who are wholly strangers to every part of the present controversy.

V.

As to the small portion of property contained in the schedule to Exhibit E (the Deed of Trust to Whittle), we claim:

1st. That it was covered by the statutory lien to the State created by the act of 1866, which actually vested in the State title *to all property* of every kind which should be purchased with the bonds, and a prior lien on all the property of the company, and authorized a seizure in case of default, of all of the property of the company, and a sale of the road and its equipments, *and all the other property belonging to the company*. Inasmuch as the act was intended to provide the means for the purchase of property to be afterwards acquired, and for the actual future construction of the road, we submit that its necessary construction is that the lien was to extend to all after acquired property, and that the use of those words was not necessary to extend the lien thereto. Certainly, it is impossible to construe it as limited to the property then in possession of the company. Such a construc-

tion would defeat the very object of the act itself, that of giving indemnity to the State out of the property which, by its guarantee, it was furnishing the company the very means of acquiring.

2d. The three bonds of the $1,950,000 series included in this schedule, were certainly included in the seizure made by the Governor. It is so alleged in the bill, page 4, and it must be presumed, in the absence of any allegations to the contrary, that the transfer thereof by Whittle to the State Treasurer was in pursuance of the seizure, and to complete the title in the State, and it is wholly immaterial that they are not included in the deed of the Governor to the State (Exhibit G). That was wholly unnecessary, as the transfer from Whittle, to which the State was entitled was all-sufficient.

3rd. It is to be observed that the plaintiff's whole case rests upon his theory that the necessary effect of the Act of 1870, for the issue of the $600,000 series of bonds, by an amendment of the Act of 1866 increasing the endorsement by adding $3,000 per mile to $10,000, as recited in the original act, operated to give the holders of the new bonds so to be issued the same rights in respect to the property of the road as the original act gave to the holders of the original bonds, and that the seizure by the Governor was for the benefit of all the two sets of bondholders alike; and that, by subsequent acts on the part of the State, the second series of bonds has, some how or other, got ahead of the first in respect to the lien on the property. If this be so, it is impossible to claim that the State or the treasurer is a *tort feasor* in respect to the three bonds.

If there was any lien in favor of any bondholders, or any trust, for the benefit of any bondholders, it extended to these three bonds and to the residue of the property left over in the hands of Whittle, and they came lawfully into the hands of the Governor, and through him into the possession of the State; besides, the bill in any apects claims no title in the plaintiff to these bonds, but

merely the enforcement of equitable claims upon them by means of the process of the court against the State as a sovereign, a jurisdiction, which we have already attempted to show, it is impossible for the court to entertain.

In respect to the shares in the New York corporation the bill certainly alleges that the Governor seized them and conveyed them to the State by his deed, and that Whittle accordingly conveyed them to the treasurer. So that the suggestion that Renfroe is in possession individually, as distinguished from his official capacity, is not tenable.

VI.

There is absolutely nothing before the court to enable it to determine the question of the constitutionality of the Act of 1870 directing the endorsement of the $600,000 series of bonds.

We have nothing but the constitutional provision and the act itself. And it is manifestly a question dependent upon the determination of the question of fact whether an amount equal to the bonds so ordered to be endorsed had already been invested by private persons.

The appellant's brief (page 13) furnishes citations of extracts from some report of a committee, but no such report *appears in the Record*, and there is no reference to it in the bill. We are, therefore, without the means of verifying or of answering those citations, which manifestly have no place in the case. If the report of the committee is in the nature of a public record or enactment of which the court can take judicial notice, the whole of it must come in, and the whole undoubtedly shows the facts to be such as to pronounce for the unconstitutionality of the act.

The argument that, assuming the facts to be such as to make the act unconstitutional, yet *because it was enacted* it

must be sustained, upon the theory that the constitution makes the General Assembly the judges as to whether the conditions required by the Constitution have been complied with, would be absolutely subversive of all constitutional safeguards.

There is no such provision in the Constitution itself, but the idea of the appellant seems to be that, in the teeth of the express prohibition of the Constitution, the mere enactment of a law in defiance of its terms, makes it constitutional; that is to say, that it is to be construed as an adjudication on the part of the Legislature that the conditions prescribed by the Constitution as the only terms on which such an act can be passed, have been complied with in this case; that an equal amount has, in fact, been invested by private persons. Such a construction simply annuls the whole constitutional provision, and makes the Legislature supreme and unlimited in the exercise of the power intended by the Constitution to be restrained.

The cases referred to in support of this anomalous proposition do not bear it out. They relate to legislative enactments as judicially construed by the courts of the State at the time when the bonds in question were put on the market as commercial paper, or to the acts of persons appointed by law to certify that the preliminary requisites in relation to the issue of bonds have been complied with. *They have no reference whatever to legislative enactments as limited by constitutional provisions.*

(*a.*) Again, the plaintiff seeks to extort from the acts of the Governor an estoppel to bind the property to a lien in favor of the plaintiff, although the act be found to be unconstitutional, as far as it binds the State as surety for the debt.

But, 1st. Unless the State is bound as surety for the debt, there is nothing to base the alleged lien upon. It is only by and under the guarantee that any lien can arise under the Act of 1866. There is no part of the Act of 1870 which can be saved if the provision directing the Governor to increase the endorsement by the addition of $3,000 per mile is held to be unconstitutional, for that is all there is of the act; and,

2d. As we have already attempted to show, the alleged acts claimed to constitute an estoppel can have no such effect as against the sovereign. The State cannot be bound by the unauthorized acts of her servants. So far as those acts exceed the scope of their authority they are as if they had not taken place.

(*b.*) Finally, it is claimed that conceding the unconstitutionality of the endorsement upon the $600,000 series of bonds, and that no question of estoppel exists, still the State cannot claim the right to be paid out of the mortgaged property until the $600,000 series is paid; upon the principle that the surety is not entitled to an assignment of the security from a creditor unless he pays off not only the debt for which he is surety, but also such further sum as may have been advanced by the creditor on security of the same mortgage. But 1st. The State is not in court claiming any such assignment. 2d. If the act is unconstitutional, and there is no estoppel, then there was no guarantee and no advance of money on the security of the statutory mortgage, which, as to the plaintiff's bonds, never existed, and

3d. The supposition assumes the fact that the transactions of the two series of bonds are distinct and independent, and that the State held the security itself as surety, holding for its own indemnity and with clear right of retainer for the amount of its liability or loss, and

4th. That right of retainer cannot be interfered with or disturbed, at any rate without payment of the debt for which the property is held by the State.

VII.

We submit that the whole effort of the appellant by means of this suit against subordinate officers who claim no interest or title, whose possession in respect to the whole property is merely the possession of the State, is to obtain an adjudication, in the absence of the State as a party, which shall bind it to obligations which it contests, and shall compel it, by compulsory process of the court, to the performance of duties which it refuses to recognize, and wrest from its possession property to which its title is conceded, and in which the plaintiff claims no title.

The judgment appealed from should be affirmed, with costs.

JOSEPH H. CHOATE,
Counsel for Appellees.

109-426

OFFICE SUPREME COURT U.S.
FILED
MAR 1 1883

IN THE SUPREME COURT.

G. A. CUNNINGHAM, APPELLANT,

vs.

THE MACON & BRUNSWICK RAILROAD AND OTHERS, APPELLEES.

SUPPLEMENTAL BRIEF, FILED BY THE APPELLANT.

A. G. MAGRATH,
W. W MONTGOMERY,
For Appellant.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL, PRINTERS,
Nos. 3 Broad and 109 East Bay Streets.
1883.

IN THE SUPREME COURT.

G. A. CUNNINGHAM, APPELLANT.

vs.

THE MACON & BRUNSWICK RAILROAD AND OTHERS, APPELLEES.

SUPPLEMENTAL BRIEF, FILED BY THE APPELLANT.

The defendants, Flewellen, Lofton and Jones unite in a demurrer and plea, in which they set forth that they are nominal parties, having no real interest in the matters set forth in the bill; and no interest in connection with a control over the said road than as directors thereof, as agents of and for the State of Georgia. That upon the facts set out in the bill and its various allegations, charges and averments, the complainant is not entitled in equity to the relief prayed against these defendants. That there is no law or authority in the State of Georgia, or elsewhere, authorizing or requiring the State to be made a party defendant without and against its consent; nor would they be authorized or justified to produce any deed or deeds; and cannot commit by any act of theirs, the State of Georgia, to the jurisdiction of this Court. 1 2

The defendant, Renfroe, pleads that whatever he has done in the matters charged in the bill, was by virtue of his office as Treasurer of the State of Georgia; and that all moneys received by him he has deposited in the Treasury of the State of Georgia, and has no control over the same, except such as is conferred by the laws of that State. 3

The defendant, Colquitt, demurs, because it appears on the face of the bill that he has no personal interest in the case; which is an attempt to make the State of Georgia, through this defendant as the Governor, a party to these proceedings, so as to bind the State by the decision of this Court. And subsequently the same defendant files a plea, setting forth all the matters stated in his demurrer; and further that the said Railroad, its franchises and property of every description, was
4 seized and sold by the Governor of the State for default in the payment of interest, under the authority of the law of the State of Georgia; that the sale was made and the property bought for the State of Georgia, and the State of Georgia is now legally the sole and exclusive owner thereof and in the full and complete possession of the property, by the legally constituted agents of the State, Flewellen, Lofton and Jones; acting as managers and directors, and controlling the same and all the property connected therewith. Further that the case made in the bill does not entitle the complainant to any
5 equitable relief whatever, and that there is no law of the State of Georgia authorizing that State to become a defendant in this litigation.

The decree of Judge Woods decides that the demurrer of the defendants are well founded in law.

And the appeal submits that decision to this Court.

The demurrers admit the matters charged in the bill. This
6 raises the question, whether the complainant states a case which entitles him to relief.

The pleas in bar to the relief asked, set up the defence, that the defendants are nominal parties, having no personal interest in the case: that they are the directors and managers of the property for the State of Georgia; that there is no law of the State of Georgia authorizing that State to be made a party defendant against its consent. And to these matters, by way of pleas, Colquitt adds: That the property has been bought for the State of Georgia, and that State is now the legal owner and in possession of the property, by its agents, who are the
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managers and directors, and controlling the same and all property connected with that road

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In considering the case, we must separate the demurrer from the pleas. The demurrer is general; the pleas set forth certain matters as sufficient defence to the bill; if the case made by the bill without sufficient pleas, or answer would entitle the complainant to relief. 8

In the first place, then, the demurrer, which, admitting the case in the bill, submits that it is not a case in which the plaintiff is entitled to any relief. The prayer of the bill is not only for such special relief as is asked, but for such other and further relief as the circumstances of the case may require, and to your Honor may seem meet.

And in the bill we find the case set forth, for which relief is asked, concisely stated, to be this:

1. That the Macon & Brunswick Railroad Company issued bonds to the amount of $600,000, on which bonds the 9
Legislature of the State of Georgia, by an Act approved the 24th October, 1870, authorized the Governor of that State to place on the bonds the endorsement of that State, to the amount of $3,000 per mile; and the issue of the bonds, so endorsed to the amount of $600,000, was equal to the amount of $3,000 per mile

2. That previous to the time when this issue of bonds, so endorsed, was made, the Macon & Brunswick Railroad Company had issued bonds to the amount of $1,950,000, on which bonds the Legislature of the State of Georgia, by an Act ap- 10
proved 3d December, 1866, authorizing the Governor of that State to place the endorsement of that State to the amount of $10,000 per mile; and the issue of bonds so endorsed to the amount of $1,950,000 was equal to the amount of $10,000 per mile.

3. That the Act of the Legislature of the 3d December, 1866, authorizing the endorsement of the State on the bonds referred to in that Act, provided, that any endorsement of said bonds shall not only vest the title to all property of every kind, which may be purchased with said bonds, in the State, 11

until all the bonds so endorsed shall be paid; but the said endorsement shall be, and is hereby understood to operate as a prior lien or mortgage on all the property of the company, to be enforced as thereinafter provided.

4. That in case of default by the company the Governor shall seize and take possession of all the property of said Railroad Company, and apply the earnings of said road to the extinguishment of said bonds or coupons, and shall sell the said
12 road and its property, in such manner and at such time as in his judgment may *best subserve the interest of all concerned.*

5. That the Act of the 24th October, 1870, was in its title declared to be "An Act to amend an Act to extend the aid of the State to the corporation of the Macon & Brunswick Railroad, and for other purposes." And the endorsement authorized by this Act was in addition to ten thousand dollars, as recited in the Act of which this is amendatory.

6. That the Macon & Brunswick Railroad, on the 22d June, 1870, confirmed the statutory mortgage of 3d Decem-
13 ber, 1866, by its formal declaration ratifying the lien created by the aforesaid Act in favor of the holders of said bonds so endorsed by the State of Georgia, and "for the better securing the payment of the said sums of money mentioned in the conditions of these said bonds or obligations above referred to, and endorsed as aforesaid, with interest thereon, according to the true intent and meaning thereof;" executed a mortgage to the Governor of the State of Gorgia, of all the property referred to in the Act of 3d December, 1856. And the bonds so endorsed, expressed on their face that the purpose
14 of the seizure authorized by the Governor was, "to dispose of and sell the same, (referring to the property covered by the statutory mortgage), and apply the proceeds to the payment of this and other bonds of said company, having an equal and like lien as this bond."

7. That on the 14th August, 1872, the Legislature of the State of Georgia passed this resolution:

Resolved by the Senate and House of Representatives in General Assembly, and it is hereby resolved by authority of the same, That the State's guarantee placed on the bonds of the Macon
15 & Brunswick Railroad Company is binding on the State."

8. That subsequently to the passage of this resolution, the complainant became and is now the purchaser and owner of the bonds set forth in the bill, a part of the issue under the Act of the 24th October, 1870.

9. That the Legislature of the State of Georgia on the 6th of March, 1875, recognized the State's endorsement on the bonds of the Macon & Brunswick Railroad to the amount of $1,950,000, (under the Act of the 3d December, 1866,) as binding on the State, but declared its endorsement on the bonds to the amount of $600,000 to be unconstitutional, null and void." 16

10. That at the same time the Legislature directed the Governer to sell the property mortgaged at "*an early day*," and if found practicable, as early as the 1st June, 1875, at public or private sale, and upon such terms and for such price in money, or first mortgage endorsed bonds of the Macon & Brunswick Railroad, or bonds of the State, *as in his judgment may be consistent with the interest of the State.* 17

11. That the Governor did order the sale to be made on the 1st June, 1875, although *he declared that "the time will not be as favorable as a later day would be."* And at that sale the Governor bid in the said property for the State of Georgia, and professed, by a certain instrument in writing, to vest the title to the said property in the State of Georgia.

12. That after the Legislature of the State of Georgia had authorized the endorsement of the State to be placed on the bonds issued under the Act of the 24th October, 1870, which endorsement it ratified by its resolution of the 14th August, 1872, and after which this complainant purchased the said bonds, on the 6th March, 1875, the Legislature of the State of Georgia denied the obligation of its said endorsement, directed the sale by the Governor of the mortgaged property to be made as early as the first day of June, 1875, and upon such terms as in his judgment may be most consistent with the interest of the State. In utter disregard of the rights of the complainants and others holding bonds issued under the Act of the 24th Oct., 1870. 18

13. That in this denial of the obligation of its endorsement, made as has been stated, ratified as has been stated, after de- 19

liberation, two years subsequent to the making of the endorsement; to deny the obligation of that endorsement, and so deprive the holders of these bonds of all claim on it, and then, by the sale made of the property, to exclude the complainant and other like bondholders from all benefit thereof, is contrary to equity and good conscience in whatever manner the relation of the State of Georgia to the statutory mortgage is concerned.

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This is the case stated in the bill. And it is submitted that, to such a case, a general demurrer cannot be sustained, because of the want of equity.

It is not intended, in thus presenting the question of the demurrer, to say the Judge who heard the case on the Circuit sustained the demurrer because of the insufficiency of the matter set forth in the bill to entitle the complainant to equitable relief. But the Pleas set forth matters of fact, which must be proved upon such proof at the hearing; the sufficiency
21 thereof decided; whether they were a bar to the relief asked. The decree is confined to the demurrer. And if the demurrer, as set forth in the pleadings, cannot be sustained, the decree, which is confined to the demurrer, must be reversed, and the case sent back.

The matters set forth by plea are, that the defendants are but nominal parties—having no interest in the property other than as directors thereof, as agents for the State of Georgia; that the bill is an effort to begin and prosecute a case against
22 the State of Georgia without its consent; that the property was seized and sold by order of the Legislature; that the State of Georgia is the sole and exclusive owner, and in the full possession of the property by the legally constituted agents of the State, referring to those described as directors, and that no law of the State of Georgia authorizes the State to become a party defendant.

How far these or any or either of them are a bar to the relief which the complainant asks, we can best consider, as they are collectively or separately involved in the following
23 propositions:

1. What is the exact nature of the obligation of a contract

made by a State, as a party, a consideration given by the other party to such contract.

2. Is there in this case a right existing in the plaintiff and bondholders in the like interest, to the benefit of the statutory mortgage given to the State?

3. Can that right be enforced in the proceedings?

That a State, as such, can become a party to a contract has been so distinctly and affirmatively settled in this Court that it cannot be considered open for discussion. 24

"Provisions, when acted on by the State and by third persons, constitute, in law, a binding contract with them, the obligation of which cannot be impaired."

Curran & Arkansas, 15 How. R., 533.

"A contract is defined to be an agreement between competent persons, to do or not to do a certain thing."

Woodruff & Trapnall, 18 How. R., 361.

"A State can no more impair by legislation the obligation of its own contracts than it can impair the obligation of the contract of individuals." 25

Woodruff & Trapnall (*ut supra*).

"A fund set apart and an invitation to the public to give credit to it under an assurance that it was placed there to pay liabilities; when credit is there given, a contract between the State and the creditor not to withdraw that fund to his injury at once arose."

Curran & Arkansas (*ut supra*). 26

"A State by becoming interested with others in a banking corporation, * * lays down its sovereignty."

Woodruff & Trapnall (*ut supra*).

"When a State invests its funds either alone or with others in a banking or other company, it does not carry with it any of the elements of its sovereign power, but occupies the bare position of any other stockholder."

State *vs.* Bank of the State, 1 So. Ca. R., p. 77.

U. S. *vs.* Planters' Bank, 9 Wheat., 907. 27

Bank of Kentucky *vs.* Wilson, 2 Peters, 318.

"This guaranty was, until withdrawn by the State, a contract between the State and every note holder of the bank."
Furman *vs.* Nichol, 8 Wall R., 61.

1. And these cases do more than resolve the position first stated, and establish the principle that a State can enter into a contract, become a party to it, incur the obligation of a party to such contract, without capacity to impair the obligation of
28 that contract; and is, so far as that contract is concerned, divested, self-divested of the attribute of sovereignty.

2. In this case there is an obligation on the State to the plaintiff and other bondholders in the like interest.

The guarantee of the State was placed on these bonds by the Governor, under the authority given by the Legislature of the State of Georgia. And the endorsement of that guarantee was affirmed subsequently by the Legislature of that State as binding on it. The bond of the Macon and Brunswick Railroad so endorsed, and after the recognition of that
29 endorsement, was, by purchase, the property of this plaintiff. It was then the evidence of a contract between the Macon and Brunswick Railroad as the principal obligor, and the State of Georgia as its guarantor, that the conditions of the bond should be performed. And the guaranty of the State was in that, a contract with the plaintiff.

The obligation of that contract, as between private persons, would not admit of any discussion. In such a case between individuals, such a defence would not be considered. A recognition of an agency, made public by proclamation
30 adopting the act of the agent; years afterward to deny the agency which had been recognized, and deny the obligation of the act of the agent which had been affirmed; would not receive the countenance of a Court.

But the State of Georgia, two years and a half after the recognition of the endorsement, and four years and a half after the endorsement was made by its Legislature, declared that endorsement "unconstitutional, null and void."

In the case of an individual, this declaration would have been ineffectual; as a party to the contract, there
31 would have arisen an estoppel, to prevent that effort to inval-

idate the contract. But that question how far applicable to the State, need not be considered, as the State of Georgia protects itself from suit by the amendment so often quoted.

The State of Georgia, towards this bond-holder, stands not only in the position of a guarantor. It holds also a mortgage given by the obligor for the payment of the bonds guaranteed by the State of Georgia. And when the State of Georgia made on these bonds its endorsement, the security of that mortgage became extended over these bonds. The right to 32
its protection became at once vested in the bondholder.

It is of no present consequence, at this point, to fix with absolute certainty the nature of that right. Whether the security given was in the nature of indemnity to the State, or directly vested in the bondholder, is practically of little consequence; for even if indemnity only, after default of the principal debtor, and also of the guarantor, the equity of the creditor attached to the security, and the power of the guarantor to discharge it ceased.

But did the right to the security for the bondholder depend 33
wholly on the recognition by the State of its guaranty? In plainer language, did the power claimed as irresponsible, in the State, to deny to the bondholder the obligation it had imposed because of its guaranty, give to it the further power to deny to the holder of the bond any right to the security?

It would seem strange to assert that he who lends his money to a corporation, on its bonds with a guarantor's endorsement, and a mortgage to be held by that guarantor to secure the payment of the bond, should make that loan with a fore-
knowledge that the guarantor, if he denied his liability, should 34
by that act have power also to discharge the mortgage.

The mortgage in this case is commonly termed a statutory mortgage. It is apt, but erroneously and loosely considered as created by the Legislature. It is not so, and for the most obvious of reasons:

The Legislature could not of itself mortgage the property of any one. To make such a mortgage, or to have the security of such a mortgage from the company, is the condition, for which the State in such cases agrees to guarantee the bond of the company. The company accepts the condition; and 35

with it obtains the endorsement of the guarantor. The agreement then of the company, that the lien of such a mortgage as is contemplated by the act of the Legislature, shall arise as soon as the guaranty is endorsed, becomes binding and is notice to the world. And the operation and effect of that mortgage is, according to the terms and conditions, declared of the same in the act of the Legislature, as complete as if the same were set forth in an indenture, with all of the particular-
36 ity which belongs to its preparation.

The act of the Legislature of the 3d December, 1866, informs us of two things: why the aid of the State was required by the Macon & Brunswick Railroad, and why that aid was given.

The financial embarrassments resulting from the late war rendered the aid of the State necessary; the completion of the road to Brunswick, which would greatly enure to the benefit of the State in developing its agricultural, commercial and manufacturing interests, was the reason why the State of
37 Georgia gave the aid so required, (see Act 3d Dec., 1866). And the act did then provide that "any endorsement of said bonds, when thus made, shall vest the title to all property of every kind which may be purchased with said bonds in the State, *until all the bonds so endorsed shall be paid;* but the said endorsement shall be, and is hereby understood to operate as, a prior lien or mortgage on all the property of the company, to be enforced as hereinafter provided for."

According then to the term so used, until all the bonds endorsed shall be paid, the title to the property covered by
38 the lien, must remain in the State until the bonds are paid, and the lien or mortgage must be prior to all others.

This is the contract between the company and the State, the one having the endorsement of the guaranty of the State, the other the mortgage, because of the guaranty

With the completion of this contract so entered into between the company and the State, the bond is offered for sale, and the purchaser then acquires an interest in that contract. The money he pays for the bond is the money he lends, on the security of all that the company gives to the guarantor,
39 besides the security of the original obligor and guarantor; he

takes the bond itself—the guaranty of the bond; and the security which the obligor has given to the guarantor. He does not forbear from taking either of these, as his security. There cannot be any such presumption as that he does not take all of the security which the company gives. The presumption in law is that the creditor accepts all the security for the payment of what is due to him, whether given directly, or that to which a court of equity will remit him in case of default in the payment of his debt. 40

This specially when he knows that for the enforcement of the guaranty he has not any available legal process. What could be the inducement for the creditor to relinquish the right to that security, if, as it might be and is, it was all that he could have? or the right in the guarantor to deny an interest in it to the creditor, if he could at pleasure extinguish his liability of the guaranty

To make this more plain, suppose the State is pleased to repudiate all the guaranties; what then? would the lien or mortgage thereby be extinguished? Such must be the case, 41 if it existed only through the recognition of the guaranty. But that conclusion would be too extravagant.

In the case of Hand *vs.* the Savannah & Charleston R. R. Co., (12 So. Ca., R. 334), the question now under consideration was very elaborately argued, and the judgment of the Court was, that the bond and coupon holders took a first mortgage or lien upon all the property intended by the act to be subject to such mortgages or lien, and that the Legislature of the State had no right to destroy or impair it. Such an attempt would be "in violation of the Constitution of the United 42 States." But the right of the bondholders is in this case so plainly set forth on the face of the bond, that it cannot be disputed. In case of non-payment, the Governor is declared to be authorized to sell the property mortgaged, and "apply the proceeds to the payment of this and other bonds of said Company, having an equal and like lien as this bond." And the security is specially described, as consisting of the "same and equal lien and mortgage, also by a sinking fund of two per cent. on the amount of said bonds; and by the endorsement of the State of Georgia, reference being had to "said act 43

and resolution of the General Assembly of the State of Georgia, assented to December 4th, 1866."

The act of 24th October, 1870, is, in its terms, amendatory of the act of December, 1866, and the bondholders under that act are entitled to all rights given or created to and for the bondholders under the last named act, subject to the priority of the bonds under the act of 1866. The relations of these two classes of bondholders to the lien or mortgages being the
44 same as that of debts, differing as to the time of their maturity, to the lien or mortgage given to secure them.

But if the expression of the purpose of this security were less clear, there would be enough in the circumstances of the case to sustain the conclusion that such representation would be considered as having influenced the action of a lender.

In Hammersly *vs.* DeBial, 12. Cl. & Firm, 45. Lord Cottenham said: "a representation made by one party for the purpose of influencing the conduct of another, and acted on by him will, in general, be sufficient to entitle him to the
45 assistance of a Court of Equity, for the purpose of realizing such representation." In Ex parte Imbert, 1 DeG. & I. 151,, it is said: "if a borrower says to a lender, if you will lend. I will place something in a particular situation for your benefit, and after obtaining the loan, does so, can he afterwards remove what he has placed?

In the Abbott Ins. Co., L. R. 11 Eq. Cases, 164, it is said: "if it be expressed or can be safely and profitably inferred from documentary or other evidence, or from the nature of the contract, that it was the intention of the parties * * the
46 lien will prevail." It must be then accepted, that the complainant, as the holder of bonds issued by the Macon & Brunswick Railroad, with the endorsement of the State of Georgia on such bonds, had a vested right to protection for his bonds in the mortgages of the company to the State, subject to the prior issue of bonds under the act of 1866.

What then was the nature of that right? It must be now what it was when the bonds were purchased. It was not a right in one class of bondholders, directly and at all points antagonistic to another class. But that of two clssses, one
47 prior to the other, both having a common guarantor, and that

guarantor holding a security for both classes, with power to sell in case of default in payment of principal or interest, as "*in his judgment may best subserve the interest of all concerned.*"

The interest of all concerned were those of the two classes of bondholders and the guarantor. Was that trust, so it may be called, performed by a repudiation of the guaranty on the second-class of bonds, and the denial to that class of interest in or right to any protection under that lien or mortgage; 48
as was most positively commanded of the Governor when what was "in his judgment most consistent for the interest of the State;" was communicated to him as that which would influence his judgment? The sale made under such circumstances was in effect the same as if made without the guarantee of the State having ever been on the bonds, or the holders having ever had any right or interest in the lien or mortgage

When the bonds issued under the acts of 1866 and 1870, endorsed as authorized by the acts of 1866 and 1870, passed 49
into the hands of *bona fide* purchasers for values; no act of the Legislature of the State could impair the obligation of the contract, as it existed in all of its parts, concerning those bonds. The "interest of the State" could not be substituted for "the interest of all concerned." And a sale made so plainly with regard to the interest of the State, and adverse to the interest of some who were concerned, cannot stand.

If a guarantor of two classes of bonds, irresponsible in the sense that he cannot be sued, holding a mortgage for th payment of both classes of bonds, with a power to sell, hav- 50
ing repudiated his obligation as guarantor in one class, disposes of that security for his exclusive interest in one class of these bonds, would that sale conclude the rights o the excluded bondholders? That is simply the question here.

And if that guarantor, at a sale so made, and under such circumstances, became the purchaser of the property, could he protect a title so acquired against the bondholders so excluded by this arrangement?

The terms of the lien or mortgages gave to the State a 51

vested title to all property purchased with the issue of the bonds endorsed by it under the Act of 1865, and to all the property of the company a lien or mortgage prior to any other. To the Governor was given the power to sell. And he was to exercise that power in case of default, in such manner as "in his judgment may best subserve the interest of all concerned." But this he did not do. He sold the property at a time which he did not consider most advanta-
52 geous; but postponed his judgment to that of the Legislature, and the end he intended to promote was not the "interest of all concerned," but that most "consistent with the interest of the State."

3. The third matter to be discussed is, can the right of these bondholders be enforced in these proceedings?

And the negative answer to this question is given, because the State cannot be sued, in consequence of the amendment of the Constitution, denying to the Courts of the United States jurisdiction in suits against a State.

53 The denial of jurisdiction in such cases and at the same time the recognition of a capacity in a State to become a party to a contract, and this further supplemented by the rule that in so becoming a party to a contract, the State divests itself of the attributes of its sovereignty, make a combination of propositions inconsistent with each other; and of course irreconcilable with their combined application to any case. And this difficulty has been in part attempted to be met by the decision that it is only when the State is a party to the record that the amendment applies, and that when the
54 subject matter of the contract is to be carried into execution; through the action of agents for the State, the Courts will, through such agents, enforce the performance of the obligation which the State has undertaken.

Nothing need be said as to the morality of a plea that a State, a party to a contract, refuses to make compensation for its breach, because it is a State. Nothing could add force to the language used by this Court when it expressed its sense of the obligation of a State to preserve its faith when once given. Nor would it be easy to find a case in which that
55 faith has been so disregarded, or more severely denounced

than by one who is now the Governor of that State. It will not, therefore, be other than pleasant because just, to see that in this case, the rights of these appellants can be protected in the Courts.

1. The property in this case is not in the actual possession of the State of Georgia. It is in the hands of certain purchasers, who say that they are holding it for the State of Georgia. If the actual possession of the property by the State of Georgia would, because of the artificial relation of 56
the parties to this controversy; oust the jurisdiction of this Court, that difficulty does not exist here; because the property is in the hands of third persons, and that property is in the possession of such third persons, with notice of the claims of the plaintiff in this case.

"The rule as to following trust funds in the hands of a defaulting trustee, apply against the assignees of a defaulting trustee as fully as against the trustee himself." Frith *vs.* Cartland, L. R. 13th Ch. Div. 719.

"The guiding principal is that a trustee cannot assert a 57
title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. But so long as the trust properly can be traced and followed into other property, into which it has been converted, that remains subject to the trust."

And this was carried so far as a deposit of money was concerned in the case of Knatchbull & Hallett, L. R., 13 Ch. D., p. 696. In that case the Master of the Rolls said, "has it ever been said until recently that there is any distinction between an express trustee or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position. It can 58
have no foundation in principle, because the beneficial ownership is the same wherever the legal ownership may be."

It can be scarcely claimed that in no event possible could an interest, legal or equitable arise in these plaintiffs. It did exist certainly before the State repudiated its guaranty, and it is not extinguished, because the State did repudiate its guaranty. The debt of the company is still subsisting and the repudiation by the State of its guaranty, by so much diminishes the security of the creditors, reducing it to such an in 59

terest as under the statutory mortgage might be set apart for the class of bonds held by the plaintiffs in this case. It thus became of the greater consequence to this bondholder and the obligation of the party, holding or controlling the security to the bondholder, also the greater.

The creditor having relied on the guarantor, who was the party holding the security when the guarantor destroyed the guaranty, the stronger was his obligation to preserve the secu-
60 rity.

Can then the plaintiffs be estopped from all relief in the case, because it is claimed that the title to this property is held and claimed by the State of Georgia?

Few have considered the peculiar relation which the amendment of the Constitution creates between an individual who is a creditor and the State the debtor; the legal relation of that creditor and debtor declared to be subsisting; that debtor capable of assuming the obligation of a contract, and in doing so, divesting itself of its sovereignty; inhibited by the Consti-
61 tution from impairing the obligation of any contract, whether its own or that between private citizens; and yet that the amendment referred to does, or is construed to do that for the State which the State cannot do for itself. The amendment so far impairs that obligation of the contract, which in the inhibition of any power in the State, it has declared shall not be done; so that in this, that duty to keep its faith, which is said to be so much higher in a State than it is in a private person, as the power of the State is greater than that of an individual, is broken, in the denial of redress to the party to whom a
62 wrong has been done.

To be relieved from this great wrong and injury, this court has said that the amendment only applies when the State is a party on the record; that if the State cannot be made a party that is a sufficient reason for not making it a party; and that if the relief to which the party is entitled in a case between private persons can be afforded by any proceedings against an agent of the State; so that the decree for relief can be given and operating directly on that agent, so compel the just and exact performance of its obligation from the State;
63 in such cases, the amendment will not be considered as applicable to it.

And the whole subject has been so well considered in the recent exposition of the rule by this court, that it would be useless to enforce by argument the propositions laid down by this court.

In the Arlington case, this court has said: "The citizen here knows no person however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he in one of the courts of competent jurisdiction has established his right to the property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." 64

It certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the courts and prevent their looking into the suggestion and examining the validity of the title. 65

"It may be said * * the officers who are sued assert no personal possession, but are holding as the mere agents of the United States; * * this distinction not recognized as sound."

"If the State * * could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. To the objection that as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party. * * This is certainly true when it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the law could not afford the same remedies against the agent employed in doing the wrong which they would afford against him, could his principal be joined in the suit." 66 67

"In cases where a State is party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured. If no rule is given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State interest,
68 without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?"

And the rule so laid down, as is seen in the judgment of this court, has been applied, in a suit for property held by an officer of the United States and reserved for military purposes, in the case of the military arsenal at Harper's Ferry; in other like cases referred to, and in pursuance of the rule laid down, that "where the State is concerned, the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may pro-
69 ceed to decree against the officers of the State in all respects as if the State were a party to the record." And the court has said, this is "intimating in a general way the views of the court at that time."

This view being now the rule of this court, is not the demurrer to be overruled and the decree of the Circuit Court reversed? The decree of his Honor Judge Woods, it may be assumed, followed the ruling of Mr. Justice Bradley, in Branch vs. the Macon & Brunswick Railroad Co., 2 Wood R. 385. And in that case the court said: "the great difficulty in the
70 cases arises from the fact that the surety is the State of Georgia, and that the said State is by its officers and agents in possession of the property given by way of indemnity." But is not the case of the possession of property, by the officers and agents of a State," the case stated in which "inspection" does not oust jurisdiction; and therefore the court can proceed to inquire into title? And if, as said in that case, "no case can be found in which any court has assumed jurisdiction to interfere with property in the possession of the State, *and admitted to have come rightfully into its possession*," this
71 would not apply to a case like this, when the property it is

alleged *has not "come rightfully* into its possession;" and the actual possession of the property by the agents of the State makes them parties, upon whom the decree of the court can operate. The allegation of such parties that their possession is the possession of the State, is "a distinction not recognized as sound," and will not exclude jurisdiction. The other objection, that the State intends to question the validity of this class of bonds, as has been said, is that which the State has already done in the most effective manner, so far as its guaranty is concerned; but the debt of the company it cannot question; and that debt, as the plaintiff insists and submits, gives an interest in the mortgage held by the State, of which he cannot be deprived by such conduct as is charged. 72

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109-1246

SUPREME COURT U.S.
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No. 80.

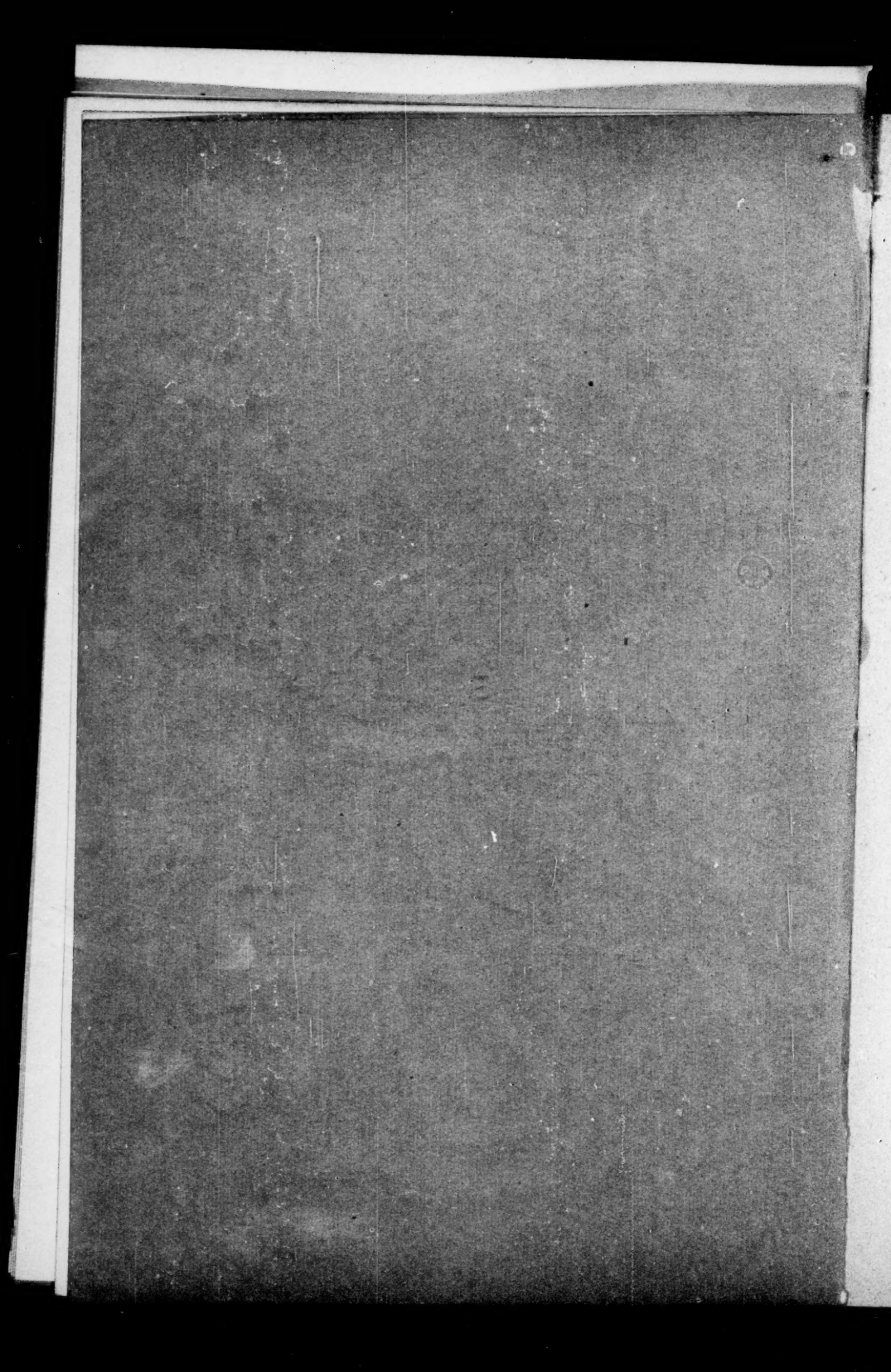
GEORGE A. CUNNINGHAM,

APPELLANT,

vs.

The Macon & Brunswick Railroad Company et al., Appellees.

BRIEF OF CLIFFORD ANDERSON, OF COUNSEL FOR APPELLEES.



No. 80.

George A. Cunningham, Appellant,

vs.

The Macon & Brunswick Railroad Company, et al. Appellees.

Appeal from the Circuit Court for the Southern District of Georgia.

BRIEF OF CLIFFORD ANDERSON, OF COUNSEL FOR APPELLEES.

1st. The lien created by the Act of 1866 was for the protection of the State and not for the security of the bond-holders, whose security consisted in the guarantee by the State of the payment of the bonds. The lien was the consideration which moved the State to endorse the bonds. She exacted it as the condition of her endorsement. Had she not agreed to guarantee the bonds, the lien would not have been created.

The Governor had no power to change the character of the lien by accepting the mortgage executed in 1870.

It is not true, therefore, that the State held the lien for the benefit of the bond-holders. She did not hold as their Trustee, but in her own right and for her own indemnity and protection.

2d. But if the State was a trustee, she was a creditor also; and had the same right to bid at the sale of the road (and *ergo* to become a purchaser) that the bond-holders or any other creditor had.

It would be strange, indeed, if the State, after having taken a lien for her own protection, should derive less benefit from it than others for whose security it was certainly not *primarily* taken--if taken for their security at all.

3d. There was nothing unfair about the sale of the road. To have received the bonds at *par*, in payment for the road, would have been unjust to all parties concerned. The holders could only claim that they should be received at what they were actually worth, viz.: their market value.

The sale could not have been enjoined, because the *time* was unfavorable; and if it could not have been enjoined, it cannot be set aside for that reason. See 57th Ga., 492.

Besides, it may well be asked: Why was not an effort made to enjoin the sale, if the time was unfavorable and the terms were unfair? A Court of Chancery would have listened much more favorably to such an application than to one to set aside the sale after it has been consummated, and especially after the property has passed into the hands of successive purchasers for value. Courts of Equity do not favor those who are *in laches*.

4th. It is claimed that the Bill was filed against Colquitt (Governor) and Renfroe (State Treasurer) and Flewellen, Jones and Lofton (Directors)—not in their *official* capacity—but as individuals. But it is clear that none of these persons held the road, or any of the assets of the corporation, in their character as individuals. The assets in the hands of Whittle and which, it is claimed, were not covered by the lien, were turned over by him to the State Treasurer, not to Renfroe as an individual; and the appropriations made by the Legislature from time to time, to pay the interest on bonds issued in exchange for those endorsed under the Act of 1866, are disbursed by the Governor and the State Treasurer as officials of the State and not as individuals. Colquitt is not now the Governor of the State, nor is Renfroe the Treasurer. They no longer have any connection with or control over these appropriations. Had they held or controlled the money thus appropriated as individuals, they would continue to do so notwithstanding the expiration of their terms of office. In this view of the matter, it must be clear that the assets turned over by Whittle, and the money appropriated by the Legislature to pay interest on the bonds, were held by Colquitt and Renfroe as State officials, and that their custody of, and power over both, have passed to their successors. How can the Court decree that these assets and this money shall be applied and used otherwise than as the State directs, without making her a party?

Now, as to the road: It never was, strictly speaking, in the possession of Flewellen, Jones and Lofton. They were simply appointed to operate it, as employees of the State. They were no more in possession of it (if so much) than the engineers and conductors who had charge of the trains which ran daily over its track. The State was as perfectly in possession as the owner of a farm or plantation who employs an overseer to over-look and manage the laborers who cultivate it. These Directors were subject to removal at any time, and in point of fact, have long since ceased to have any connection with, or control over the road.

None of the cases relied on by the appellant furnish a precedent for jurisdiction by the Courts in a case like this.

See 1st Peters 110, 24th How. 66, 11th Peter 257, 16 Wallace 203.

98 U. S. 433, 906 U. S. 196.

Clifford Anderson
of Counsel
for Appellees.

NG-446

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883

No. 17.

GEORGE A. CUNNINGHAM,

Appellant,

vs.

THE MACON AND BRUNSWICK RAILROAD COMPANY,
AND OTHERS,

Appellees.

ADDITIONAL BRIEF FOR APPELLEES.

JOSEPH H. CHOATE,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1883.

GEORGE A. CUNNINGHAM,
Appellant,

vs.

THE MACON AND BRUNSWICK Railway Company and others,
Appellees.

No. 17.

Additional Brief for Appellees.

First, *as to the question of jurisdiction.*

Since the original brief of the appellees was filed the decision of the court in the *Louisiana Case* (2 Supreme Court Reporter, page 128), appears to have finally settled this question in favor of the appellees.

The following description of the relation of the defendants to the controversy contained in that case, seems to us exactly applicable to the defendants here, including, as well, the State managers of the railway, as the Government and the Attorney-General.

"The Treasurer of the State," so the court says, "is the "keeper of the treasury, and in that way is the keeper of "the money collected from this tax, just as he is keeper "of other public moneys. The taxes were collected by "the tax collectors, and paid over to the State Treasurer, "that is to say, into the State Treasury, just as other taxes "were when collected. The Treasurer is no more a trus- "tee of these moneys than he is of all other public "moneys. *He holds them, but only as the agent of the "State. If there is any trust, the State is the trustee, and "unless the State can be sued, the trustee cannot be en- "joined. The officers owe duty to the State alone, and "have no contract relations with the bondholders. They "can only act as the State directs them to act, and hold "as the State allows them to hold.* It was never agreed "that their relations with the bondholders should be any "other than as officers of the State, or that they should "have any control over this fund except to keep it like "other funds in the Treasury, and pay it out according "to the law They can be moved through the State, but "not the State through them."

Again, at p. 138. The court, after citing, with approval, this proposition from the opinion of BLACKBURN, *J.*, in *Queen* vs. *Lds. Commis. of Treasury*, L. R., 7 Q. B., 387: "It seems to me that the obligation, such as it is, is upon her Majesty, to be discharged through her servants, and you cannot proceed, therefore, against the servants," adds, with great emphasis: "*So, here, the obligation is all on the State, to be discharged through its servants: and the money is held by the officers proceeded against in their character as servants of the State, and no other.*"

Viewing this case in the light of the opinion of the court in that case, it is impossible to sustain the jurisdiction here.

There was an express contract of the State with the consolidated bondholders, as explicit and solemn as the English language could make it, repeated in the bond, in the Act of 1874, and in the constitutional amendment, by which it was made the plain duty of the very State officers who were made defendants to collect the tax imposed, and to

pay out of it to the bondholders the interest coupons due upon their bonds, and no further legislation was to be requisite for such payment from the Treasury. The tax thus irrevocably appropriated to the plaintiffs had been collected. The treasurer was before the court with the money in his hands. So clear was the right of the plaintiffs to have their coupons paid out of this money by the terms of the contract that the court, although finding no remedy for the right was constrained to say (p. 134): "Whatever "may be ordinarily the effect of a promise or pledge of "faith by a State, the language employed in this instance "shows unmistakably a design to make these promises and "these pledges so far contracts that this obligation would "be protected by the Constitution of the United States "against impairment." Nothing stood between the right of the plaintiffs, which the court admitted, and the remedy they sought, except sheer and bare-faced repudiation by the State, expressed in the enactment of the "Debt Ordinance" of 1880, which in its own unique language "REMITTED" the coupon of January, 1880, "and transferred the interest taxes collected to meet said "coupon to defray the expenses of the State government." So that the case was reduced to this question, as stated in the opinion (p. 136): "The question then is whether the "contract can be enforced, notwithstanding the Constitu-"tion, by coercing the agents and instrumentalities of the "State, whose authority has been withdrawn *in violation* "*of the contract*, without having the State itself in its "political capacity a party to the proceedings."

The Constitution (of 1880) that thus stood in the way was found by the court to be utterly void as against the contract with the bondholders, as being in defiance of the Constitution of the United States. Yet the relief asked, whether by way of injunction or *mandamus*, was denied, because it would, in the language of the court (p. 136), "require the officers against whom the process "goes to act contrary to the positive orders of the supreme "political power of the State, whose creatures they are, "and to which they are ultimately responsible in law for "what they do. They must use the public money in the "treasury and under their official control in one way,

" when the supreme power has directed them to use it in " another. And they must raise more money by taxation, " when the same power has declared it shall not be done."

Here, on the contrary, the case made for the interposition of federal jurisdiction for the relief of the appellant is infinitely weaker, and the obstacles presented against it are infinitely greater.

Here, the alleged guarantee which they claim to hold is denied by the State of Georgia, not upon the ground of any subsequent enactment aiming at its repudiation, but on the ground that the act ordering it was void as being in violation of the then existing Constitution of that State. *Here*, the appellants, assuming the guarantee to be good, instead of having a clear and admitted right, claim only by implication a contract lien upon property not in the rightful possession of the defendants, but of the State itself, and the contract and lien are disputed by the State, which claims to be the absolute owner of the property by purchase.

Here, the appellants claim at the best only an equity, which they seek to have worked out of the State's admitted title and possession by means of the exercise of the equitable power of the court. They pretend to no title and to no right to possession in themselves. *Here*, the defendants, who are served with process, and who are brought before this court by the appeal, viz., the Governor and the Directors (Record, p. 34), instead of being charged by statute or otherwise with a plain official duty requiring no exercise of discretion, the performance of which, as enjoined by statute or otherwise, would put the appellants in the enjoyment of their right as claimed, have no duty whatever imposed upon them by statute or otherwise, no relation whatever to the alleged lien or claim of the plaintiff, no duty or power to satisfy it, or to take any single step towards satisfying it. They have no relation whatever to, or duty in regard to, the implied trust which the appellants seek to impose upon the State's property. They have no title, no possession, no control, no power. As to the Governor, it is not even alleged that he either officially or personally has anything whatever to do with the property. As to the two other appellees, it appears by the Act

of March 5, 1875, set forth on our original brief, p. 4, that their sole and simple relation to the property sought to be charged with the trust in favor of the appellants is that after the purchase of the railroad by the State, they were appointed by the Governor as "discreet and responsible persons to take charge thereof as a Board of Directors, with full and ample power to manage the same." Their only duty and only power is to "take charge" and to "manage" for the State, and as its Commissioners. For them to transfer it to the plaintiffs, or to a Receiver for their benefit, would clearly be not the performance of a plain duty requiring no discretion imposed upon them by statute, but an utter and absolute violation of their only duty in the premises. This feature alone, viz., the relation of the defendants in court to the matter in controversy between the State and those seeking relief against it, puts an impassable gulf between this case and every case in which the court has maintained jurisdiction against State officers. In *Osborn* v. *Bank of U. S.*, the defendants had the plaintiff's money, wrongfully taken from its vaults, and under cover of a void statute, passed in open defiance of the Constitution of the United States, were hurrying, when stopped by Federal process, to put it into the State Treasury. As this court explained it in the *Louisiana Case*, p. 138: "The object" (in that case) "was to prevent money which had been unlawfully taken out of the bank by the officers of the State from getting into the Treasury." Again (p. 139), "Thus the money seized was kept out of the Treasury *because, if it got in, it would be irretrievably lost to the bank, since the State could not be sued to recover it back. No one pretended that if the money had been actually paid into the Treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers.*"

In *Davis* v. *Gray*, the individual defendants, under the authority and direction of a void State law, had the power and duty, and were actually proceeding to issue new land warrants for land which belonged, as the court found, to the plaintiff, and "were thereby attempting to place a cloud on his title."

In *Board of Liquidation* vs. *McComb*, the individual defendants not only had possession of the consolidated bonds, but were charged under a void and unconstitutional law with the plain duty and full power, and were proceeding, when enjoined by the court to issue them to parties not entitled to receive them, and in gross violation of the rights of the plaintiffs.

It is submitted that this distinction completely meets the objections of the learned justices of this court who dissented in the *Louisiana Case*, and there is nothing in the opinions of either of them which would justify or countenance the assumption of Federal jurisdiction here, in behalf of plaintiffs who claim no title against individual defendants who have neither title, possession, power nor duty in the premises, as a vicarious means of enforcing, by judicial power, a disputed equity upon a State which, by the Constitution, is out of the reach of this court.

Mr. Justice FIELD's position was, that the Federal Courts had ample power and ought to exercise it to compel State officers who, by the statute, were charged with the plain duty, involving no discretion, to perform its contract with the suitor, to do so, and to restrain them from diverting to other uses the money which they ought to pay to the plaintiff, in obedience to a subsequent unconstitutional law of the State, passed for the avowed purpose of violating the State's contract with the plaintiff. "All that is claimed," he says, "is simply a right to compel the State's officers to obey her own enactments, such as were constitutionally passed." He demonstrates that if the new Constitution, the "Debt Ordinance," had never been adopted, there could be no question as to the power of the courts to require the moneys collected to be applied to the payment of the interest, and insists that the new Constitution, which repudiated, should be treated as though it had never existed; that the three cases above cited were ample precedents for maintaining jurisdiction, to compel the individual defendants, although the State under which they acted was not, and could not be a party, *to perform in its behalf the duty by its laws imposed upon them in the performance of which the plaintiffs were interested, and to restrain them from threatened violations of that duty;* and that in the

case then under discussion the defendants had the plaintiff's money in hand, and the plain duty imposed upon them by the law of paying it over to them (p. 150). "*The ministerial duty alone remained with the officer of the State having charge of the fund, wherever it might be, to apply it.*"

We think that his opinion will be searched in vain for a word that would warrant the present action.

So Mr. Justice HARLAN maintained that where a State had entered into an express contract with the suitor and had by its laws provided all the necessary machinery for carrying it into execution, by officers who were charged with the plain duty of performance, it could not by a subsequent void act, intended for the mere purpose of repudiation, forbid those officers to perform that duty, and that the power and the obligation rested with the Federal judiciary, disregarding the void enactment, to compel the officers to perform and to prevent them from diverting the money in their hands due the plaintiff, notwithstanding the impossibility of making the State in its political capacity a party. He demonstrated that there was a statutable obligation resting upon the State Treasurer, one of the individual defendants, to pay the plaintiff's coupons as they matured out of the moneys in his hands, and upon the authority chiefly of the same three cases above cited he finds ample precedents for the exercise of the power which the court was there asked to put forth to compel the State officers to perform their duty.

Could either of these learned judges have reached the conclusions which they did, if the plaintiffs in that case, as in this, had presented to the court only a disputed contract claimed by the State to have been in its inception void, and had claimed only to enforce against the absent State an equity in property admitted to be the property of the State and in its possession, and had brought before the court not officers charged with some trust, power, or duty, bearing some relation to the performance or realization of the plaintiff's contract, equity, or lien, but only officers having nothing whatever to do with it?

The distinctions pointed out in the *Louisiana Case* between the cases of *Osborn* vs. *Bank of U. S*, 9 Wheaton,

738; *Davis* vs. *Gray*, 16 Wall., 203, and *Board of Liquidation* vs. *McComb*, 92 U. S., 531, and the case then pending, equally distinguished them from the case at bar.

The Arlington Case, 106 U. S., affords no color for the maintenance of the present suit.

In that case the defendants, in their official capacity, it is true, but still in fact, had actual possession of the land which was the subject of the suit and could only suggest against the jurisdiction of the court that the title was in the United States, a suggestion which proved to be utterly without foundation. It was perfectly clear upon the record presented to this court that their holding was without a shadow of right, and that the plaintiffs were entitled to the possession which the court awarded them, but the present case is to be determined by the facts stated in the complaint, which the demurrer, for the purposes of the present argument, admits, and the case so made is of a railroad and other property in the actual and rightful possession of the State.

Even if the sale was utterly void, the condition of things falls back into what it was before the sale, a confessedly rightful possession of the State with a clear title at any rate to hold as indemnity against its liability upon the bonds.

Here is not the case of "property wrongfully acquired," to use the language of Chief Justice Marshall in the case of *Osborn* vs. *The Bank of U. S.*, but of property rightfully acquired by and possession concededly vested in the State itself. But the State being so in possession claims also as absolute owner by virtue of the sale and the Governor's deed, made in pursuance of the resolutions of March 6, 1876.

The contention of the appellants is, that, instead of being absolute owner or holder merely for its own indemnity, the State holds as trustee for the bondholders represented by him, but this concedes title in the State, as well as the possession, and the point presented by the record is whether the question of the liability of the State, on the guarantee which is the foundation of the plaintiff's whole action, and which is denied, the question of the nature of the State's title, whether absolute or as indemity or in

trust (some title being conceded), can be determined without the presence of the State as an indispensible party. And further, whether the property itself can be taken by force by the court out of the possession of the State in its absence as a party and applied under its process to the relief of these pursuing bondholders.

There may have been great diversity of views in other cases, as to how far the courts of the United States could exercise their process against the agents of States; but we say with entire confidence, that no case can be found where it has even been suggested that a court could exercise such power as is claimed here.

In truth, the final question and prayer for relief presented by the complaint is not more monstrous, namely, the claim to have the finances of the State administered by the court to accomplish the payment of the plaintiff's coupons *pro rata* with those of the State bonds, which were given to redeem the bonds issued under the Act of 1866, in respect to which claim nothing could be more pertinent than the language of the Chief Justice in the *Louisiana Case*. The remedy sought, he says: "Implies "power in the judiciary to compel the State to abide by "and perform its contracts for the payment of money, not "by rendering and enforcing a judgment in the ordinary "form of judicial procedure, but by assuming the control "of the administration of the fiscal affairs of the State to "the extent that may be necessary to accomplish the end "in view."

"And again, the remedy sought, in order to be complete, "would require the court to assume all the executive "authority of the State, so far as it related to the enforce-"ment of this law, and to supervise the conduct of all "persons charged with any official duty in respect to the "levy, collection and disbursement of the tax in question, "until the bonds, principal and interest, were paid in full, "and that, too, in a proceeding to which the State, as a "State, was not and could not be made a party. It needs "no argument to show that the political power cannot be "thus ousted of its jurisdiction, and the judiciary set in "its place."

We suppose that the true test of the jurisdiction of the court as to the question raised by this demurrer is to suppose the court called upon on the facts alleged in the bill to proceed to judgment as prayed for.

Could the court, in the absence of the State, appoint a receiver to take the possession of the property by force from the State?

Could it, in the absence of the State, compel the defendants, whose sole duty is to the State, in violation of that duty, to transfer to the Receiver the property which they are only commissioned to "take charge of" and "to manage?"

Could the court adjudge the mortgage, which the plaintiff claims, to be foreclosed and the State barred of all equity in the premises without the presence of the State as a party?

Could it enjoin the State Treasurer from paying coupons on the bonds of the State exchanged for $1,950,000 of endorsed bonds?

Could it adjudge, in the absence of the State, that the State was liable on the guarantee which it claims was given in its name, but without its authority?

To no such extent has any case held that any court can go.

In truth, the real question here involved is, whether the State, in the ordinary sense of equity pleading, is *an indispensable party,* when manifestly none of the defendants of record have any right or authority to stand as its representative for the determination of any one of these several questions. No decree that could go against them or either of them could bind or affect the absent State.

All the ejectment cases, and other common law cases in which the jurisdiction of the court to proceed against State or National agents has been upheld, in the absence of the State or Nation as a party to the record, have rested upon title in the plaintiff and the utter absence of title in the defendant.

None of these cases certainly can be relied upon for the appellant here; for here there is no pretense of any title in him. He simply seeks to work out an equity through and by means of the admitted title of the State.

Nor do the equity cases which have maintained the jurisdiction against parties who were proceeded against as agents of the State in its absence, afford him any better support. In the strongest of those cases *Davis* vs. *Gray* and *Board of Liquidation* vs. *McComb*, the decision seems to rest upon the ground that "when a plain official duty, requiring no exercise of discretion, is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it, notwithstanding the officer pleads the authority of an unconstitutional, and therefore void, law for the violation of his duty," and they contain nothing to sanction the appellant's claim here.

Even in respect to the trifling items of property which passed under the Whittle deed the plaintiff claims no title whatever. If it was covered as after acquired property by the statutory lien given to the State by the Act of 1866, or if it was covered by the voluntary mortgage given to the State in confirmation of the statutory lien, it was rightly included in the sale and the Governor's deed.

That it was so covered is claimed by the State, and the State is an indispensable party to the determination of that question. If it was not so covered, still the plaintiff has no lien upon it. He is not a judgment creditor of the company.

In any event the appellant has no title to it—and as the Chief Justice said in the *Louisiana Case*, when explaining the *Arlington Case*: "*The bondholders never owned it. The most they can claim is, that the State ought to use it to pay their coupons, but until so used it is in no sense theirs.*"

There is another clear distinction between the *Arlington* case and an equity suit like the present.

In an ejectment suit which determines the right to the possession only, and the party who is in actual possession is the defendant in the action, the plaintiff who establishes his right to the possession may recover judgment, without barring or concluding the right of one not a party to the suit to establish his title in another action, even though his title may have been pleaded by the defendant in the original

action. As Mr. Justice MILLER said (p. 222): "Another "consideration is, that since the United States cannot be "made a defendant to a suit concerning its property, and "no judgment in any suit against an individual who has "possession or control of such property, can bind or con- "clude the Government as is decided by this court, in the "case of *Carr* vs. *The United States*, the Government is "always at liberty, notwithstanding any such judgment, "to avail itself of all the remedies which the law allows "to every person, natural or artificial, for the vindication "and assertion of its rights. Hence, taking the present "case as an illustration, the United States may proceed "by a bill in Chancery to quiet its title, in aid of which, "if a proper case is made, a writ of injunction may be "obtained. Or, it may bring an action of ejectment, in "which, on a direct issue, between the United States as "plaintiff, and the present plaintiff as defendant, the title "of the United States could be judicially determined."

But, of course, no such consideration can pertain to the present case, where, notwithstanding the absence as a party, of the State of Georgia, the sole trustee of the alleged trust, the sole party in whom rests the title and possession of the property sought to be redeemed, the court is asked by the appellants, upon the pretext of having as individual defendants, servants of the State, who have nothing to do with the trust, to proceed to determine the questions pending between the State and the appellants, and to take into its own hands, by means of a Receiver, and administer in equity, the property involved.

Another important distinction, and one which ought not to be lost sight of, is that in the *Arlington Case* the court was dealing with the question of the necessity, upon general principles of common law, of the presence of the United States as a party to the record, to enable the court to entertain jurisdiction in an ejectment suit against officers of the United States in possession of land, when they pleaded its title and authority in defense of their possession. There no express constitutional prohibition rested upon the court, as in the case of a State of the Union.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State."

To say that this prohibiton shall itself justify a Federal court in proceeding to determine a controversy between a State and citizens of another State, by substituting as a party agents or servants of the State, who have neither officially nor personally any title, possession or control, or power of disposition of the subject of the controversy, would surely be not merely evasion, but utter nullification of the constitutional provision, and that, too, by the court peculiarly charged with the duty of vindicating and maintaining it.

Fortunately this is a long step beyond what it has ever been suggested that this court could go.

Even the dictum of Mr. Justice SWAYNE in *Davis* v. *Gray*, that the constitutional impossibility of bringing in the State as a party in cases where it is concerned, is a sufficient reason for omitting to do it, and that the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record, of course, had reference only to the case before him, where the individual defendants by means of their official functions as officers of the State had the power on behalf of the State, and were proceeding under the cover of a law void by the Constitution as impairing the validity of the plaintiff's contract to issue patents for the plaintiff's land, and thereby unlawfully to create a cloud upon his title.

But the court in the *Arlington Case* has declined to adopt or reaffirm that dictum.

After quoting the whole substance of the opinion in *Davis* v. *Gray*, Mr. Justice MILLER says (p. 215): "*Though* "*not prepared to say now that the court can proceed* "*against the officer* '*in all respects*,' *as if the State were* "*a party*, this may be taken as intimating in a general "way the views of the court at that time."

And Mr. Justice GRAY (p. 244) says:

"This dictum overstates the decision in *Osborn's Case;* "goes beyond what was required for the decision of *Davis*

" v. *Gray*, in which the object of the suit and the whole " effect of the decree were to prevent the Governor and " the Commissioner of the General Land Office of the " State of Texas from signing patents for lands of which " the plaintiff had the title uuder a previous grant from " the State, and as the State cannot hold money or prop- " erty,otherwise than by its officers or agents, would, if " understood as laying down a general rule, practically " nullify the Eleventh Amendment of the Constitution."

We respectfully submit that it is not enough to give the Federal Court jurisdiction for a plaintiff to allege that he has a cause of action against a State, and to serve with process any servant or agent of the State, as a substitute for the State, whom he is prohibited from suing.

If his cause of action be really against the State, then by the Constitution he cannot maintain his action therefor. If he can bring before the court, as an individual party, some officer of the State against whom he has a cause of action, as was done in the *Arlington Case*, and in *Bank of U. S.* vs. *Osborn*, in *Davis* vs. *Gray* and *McComb* vs. *Board of Liquidation*, the court may proceed, but when, as in this case, there is no such party before the court, he cannot proceed.

If, as here, he seeks to enforce a trust, and the State alone, and no officer of the State, is trustee, he cannot by bringing in any officer he pleases, give the court jurisdiction.

If, as here, he seeks to redeem in the right of a subsequent incumbrance, property purchased and held under his purchase by a prior incumbrance, and that purchaser and holder is a State, and not an officer of a State, he is equally powerless.

Second.—*As to the alleged lien, equity or claim of the appellants.*

What the exact nature of the rights, or lien, if any, of the original holders of the $1,950,000 of bonds may have

been, it is not now necessary to determine. *But it is certain from the Record, that the appellants and the other holders of the issue of* $600,000 *bonds have no lien, and that if they have any right to redeem whatever, it is subject and subordinate to the State's absolute right to hold the property for the* $1,950,000 *of bonds which it has not paid off as debtor, but taken up, as endorser.*

(*a.*) The statutory mortgage, to the State at any rate, for its indemnity against its guarantee on the $1,950,000 of bonds issued under the Act of 1866, is clear and conceded.

If the original holders of that issue of bonds had a lien enforceable directly by themselves, in virtue of the mortgage deed, and the special provisions of that issue of bonds, such lien and all their rights in respect of it vested in the State, when, as alleged in the bill, the State took up those bonds by an issue of its own bonds. It is too preposterous to call for an answer, to say that by thus taking them up the State extinguished those bonds, or any rights pertaining to their holding.

The State having acquired that whole issue of bonds, and being found by the bill to be still the owner and holder of them, has with this added to its own original statutory mortgage, every possible right, title and interest in the property seized and held by it, which can possibly pertain to that issue of bonds.

The lien, thus acquired by it, is and remains beyond all question prior and superior to any lien or right attaching to the second issue of $600,000, supposing the latter to have had any.

(*b.*) The distinction between the two issues is very marked and clear. To the $1,950,000 series attaches in the hands of the State their final and present holder, every right in respect to the property of the company created by the act, or the mortgage deed, whether given to the State or to the bondholders. The act is in these words :

"SECTION 1. Be it enacted, etc., That his Excel-
" lency, the Governor, be, and he is hereby authorized
" to place the endorsement of the State on the bonds
" of the Macon & Brunswick Railroad Company,
" which said company may issue, to the amount of
" ten thousand dollars per mile for as many miles
" of said road as are now completed, and the like
" amount per mile for every additional ten miles, as
" the same may be completed and placed in running
" order, on the following terms and conditions, to
" wit: Before any such endorsement shall be made
" the Governor shall be satisfied that as much of the
" road as the said endorsement shall be applied for is
" really finished and in complete running order, and
" that said road is free from all liens, or mortgages,
" or other incumbrances, *which may in any manner*
" *endanger the security of the State;* and upon the
" further condition and express understanding that
" any endorsement of said bonds, when thus made,
" *shall not only vest the title to all property of every*
" *kind which may be purchased with said bonds in*
" *the State*, until all the bonds so endorsed shall be
" paid, *but the said endorsement shall be, and is*
" *hereby understood to operate as a prior lien or*
" *mortgage on all the property of the company, to be*
" *enforced as hereinafter provided for.*

" SECTION 2. In the event of any bond or bonds
" endorsed by the State, as provided in the first sec-
" tion of this act, or the interest due thereon, shall
" not be paid by said railroad company at maturity,
" or when due, it shall be the *duty of the Governor*
" upon information of such default by any holder of
" said bond or bonds *to seize and take possession of*
" *all the property of said railroad company and apply*
" *the earnings of said road to the extinguishment of*
" *said bond or bonds or coupons, and shall sell the*
" *said road and its equipments, and other property*
" *belonging to said company, in such a manner and*
" *at such times as in his judgment may best subserve*
" *the interest of all concerned.*"

If this act created a trust for the bondholders, certainly the State, and no officer of the State was the trustee; if it gave any kind of lien or equity to the bondholders, it was one to be worked out only through the title and possession of the State.

Apparently, it was perceived by the company or the bondholders, that it did not give a direct lien to the latter, and an effort was evidently made, to eke out the language of the statute by the words of the bonds themselves, the contract between the company and the bondholders. For this bond (Exhibit C, Record, p. 15) expressly provides or states that "*the Governor of the State of Georgia is authorized to seize and take into possession* the railroad, together with all the equipments and appurtenances of the same, *and apply the proceeds to the payment of this and other bonds of the company having an equal and like lien as this bond.*"

In June, 1870, apparently after the whole series of $1,950,000 bonds were issued, the company, as it had a perfect right to do, though it could not, of course, thereby disturb any lien or right of the State, executed and delivered to the then Governor of the State, its voluntary mortgage of all its property, acquired or to be thereafter acquired, which mortgage, after referring to the act, recites (Record, p. 11) that "the com-
" pany are desirous of confirming the lien created by
" the aforesaid act, *in favor of holders of said bonds*
" *so endorsed as aforesaid*, and for the purpose of
" *confirming* the aforesaid lien, *and* for the *better se-*
" *curing the payment of the said sum of money men-*
" *tioned in the condition of said bonds*," and conveys the property to the then Governor of the State, and to his successors in office, and assigns, forever, conditioned for the payment of the bonds.

When the default took place in the payment of interest and the Governor seized the road, the first series of bonds had all the rights created by the statutory mortgage, whatever they were, and the additional rights created by the language used in the bonds, and by this voluntary mortgage.

But the situation of the appellant's bonds is wholly different.

These bonds rest only upon the amending Act of 1870, which, after reciting that more money than had been expected was needed to finish the road, enacts only as follows :

"SECTION 1. That the above-recited act be so "amended as to authorize the Governor to place the "endorsement of the State to the extent of three "thousand dollars per mile upon the bonds of said "Macon and Brunswick Railroad Company in addi- "tion to ten thousand dollars, as recited in the act of "which this is amendatory."

We submit that this act, properly construed, did nothing but to authorize the endorsement by the Governor on the part of the State of additional bonds to the extent of $3,000 per mile of the road. It does not purport to amend the first section of the Act of 1866, so as to make it read "thirteen thousand" instead of "ten thousand." It does not provide that the additional bonds shall be issued or guaranteed "upon the same terms and conditions" as the "ten thousand;" and in no manner purports to attach to the new bonds the conditions and provisions specially attached by the act of 1866 to the original bonds.

It may be the acceptance and use by the company of the guarantee upon the additional bonds would attach to them the lien *to the State*, provided by the Constitution of 1868, as an essential condition of the loan of the credit of the State (*vid.* Record, p. 3).

"The General Assembly shall pass no law making "the State a stockholder of any corporate company, "nor shall the credit of the State be granted or loaned "to aid any company without a provision that the "whole property of the company shall be bound for "the security of the State, prior to any other debt or "lien except to laborers."

Unless this result should follow from the mere acceptance of the guarantee, then the Act of 1870 would necessarily be void by force of this constitutional provision.

It was evidently the understanding of the company and of the takers of the new bonds, that they carried to the bondholders no such rights as were apparently undertaken to be given to the old bonds, for the bonds themselves (*vid.* Record, p. 17, Exhibit D) contain none of the special clauses and provisions for a lien to the holders, which, as has been seen, were inserted in the original bonds. They are in form an ordinary bond for the payment of money. They contain no reference to the Act of 1866, or to any lien or security, and state merely: "This bond is one of a series to the extent of $3,000 per mile of the Macon and Brunswick Railroad Company. Endorsed by the State of Georgia in accordance with an act of the Legislature, passed October 29th, 1870."

If this be the true situation of these $600,000 of bonds, then clearly they carried nothing to the holder but the obligation of the company, the guarantee of the State, and such equity, if any, as accrued to the holder against the property when seized by the surety under the lien secured to the State alone for its indemnity by the Constitution.

Or if it should be deemed that a very liberal rule should be applied to the construction of the Act of 1870, so as to incorporate in it all the conditions and provisions contained in the Act of 1866, then still for the reasons stated in the third point of our original brief, we submit that the lien of the statutory mortgage thereby created to secure them, is not a lien in favor of the bondholders, but is only an indemnity to the State.

And even to this extent, the whole question of the validity and existence of the guarantee and of the statutory mortgage upon these bonds, is, as the bill states, disputed by the State upon the ground that the act authorizing the guarantee upon them, was in di-

rect violation of other provisions of the State Constitution.

In no possible way can the holders of the $600,000 of bonds claim the benefit of the special provisions contained in the first series, or of the voluntary mortgage executed by the company to secure them, and which had reference to the first series alone.

In no possible way can they take precedence of the lien provided for the first series, or come in upon the property upon an equality or *pro rata* with the first series.

Before the Act of 1870 was passed and the new bonds guaranteed under it the rights of all parties to the first series, the company, the holders, and the State were definitely fixed. These could not be disturbed without the consent of the holders of the first series, which is not alleged or pretended. Those rights in their full extent are still preserved and enure to the State, as the holder and owner of the entire $1,950,000 of the first series.

Those rights certainly covered all the property of the company, after acquired as well as already acquired, for so the voluntary mortgage executed to secure the first series of bonds expressly provided.

There is, we submit, no process of reasoning by which a claim can be put forward or sustained on the part of the holders of the second series of bonds by which, in respect to any portion of the property of the company, they can stand anywhere but behind and subject to the lien and title of the State as the holder of its own original statutory mortgage and of the entire first series of bonds with all the rights that attached to them whatever they were.

(*c.*) Such being the necessary relation of the two series of bonds in relation to the property of the company, if, indeed, the guarantee of the State upon the second series has any validity whatever, how have the proceedings of the State in the seizure and sale

and purchase of the property in any way helped the second series, or disturbed the absolute priority of the State as holder of the first?

It is claimed in *Mr. Montgomery's* brief (p. 2) that the seizure was in the interest of the holders of both series of indorsed bonds. But there is no such allegation in the bill. On the contrary, the bill expressly states (p. 3) that the Governor made the seizure under the power vested in him by the Act of 1866. But, however, the seizure was made; when once in his hands, it stood there subject to the lien of the State as the holder of the first series of bonds, which still remained unpaid and in full force, as a prior and paramount lien.

If, as the State claims, the sale was valid, then its title to the entire property became absolute. The sale and the Governor's deed conveyed it all absolutely to the State.

If, as the appellants claim, the sale was for any reason invalid, it is, as the bill claims, voidable only, and any decree of a Court of Equity avoiding it would only leave the property still in the State's hands as mortgagee in possession.

If there is any right on any ground in the holders of the second issue of bonds to redeem, it is to redeem from the State as first incumbrancer, by paying $1,950,000 and interest, and there is no allegation or pretence in the bill of any purpose or readiness to do so, or that the property is worth more than enough, or even enough, to pay the first lien.

The whole and only pretence of the bill is to supplant the State entirely as the holder of the first encumberance, and to come in ahead of it or *pro rata* with it on no grounds that have been or can be intelligibly stated.

(*d.*) In any shape, then, in which any real or supposed form of the appellants' claim can be stated, it is against the State, which is not and cannot be made a party. The State is an indispensable party to every possible question that can be stated as an issue to be tried.

No one of the defendants is the trustee of any trust, or charged with any power or duty towards the appellants, or vested with any title or possession of property of which they seek the benefit. Any other officer or citizen of the State might just as well have been made a defendant to represent the State as these defendants, and if this bill can be sustained, the Eleventh Amendment of the Constitution henceforth goes for naught, and any citizen of another State pretending to a claim against one of the States of the Union will have only to make some officer of the State, no matter who, defendant, and proceed to judgment and execution against the State, and that because the Constitution forbids it to be sued at all.

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